Supreme Court, U.S.
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No. 99-_____

In the Supreme Court of the United States

UNITED STATES OF AMERICA *EX REL.*
CAROL RAE COPPER FOULDS,
Petitioner,

v.

TEXAS TECH UNIVERSITY AND
TEXAS TECH UNIVERSITY HEALTH
SCIENCES CENTER,
Respondents.

On Petition For a Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Eleventh Amendment to the United States Constitution prohibits *qui tam* suits against a state under the False Claims Act, 31 U.S.C. §§ 3729-3733, if the United States does not initially intervene in the litigation?

PARTIES TO THE PROCEEDING

The parties in the United States Court of Appeals for the Fifth Circuit were *qui tam* plaintiff Carol Rae Cooper Foulds, the United States of America (which intervened in the appeal), and defendants Texas Tech University and Texas Tech University Health Sciences Center, which are both Texas state entities. There are no parent or publicly held companies owning 10% or more of defendant entities.

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PETITION FOR A WRIT OF CERTIORARI

The United States *ex rel.* Carol Rae Cooper Foulds respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Appendix, *infra*, at App. 1 - App. 51) is reported at 171 F.3d 279. The opinion of the district court (App. 52 - App. 74) is reported at 980 F. Supp. 864.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1999. A petition for rehearing en banc was treated by the Fifth Circuit as a petition for panel rehearing and denied on June 1, 1999 (App. 77 - App. 78). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eleventh Amendment to the United States Constitution provides that:

> The Judicial power of the Untied States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733, is reproduced at App. 79 - App. 115.

STATEMENT OF THE CASE

1. The False Claims Act, 31 U.S.C. §§ 3729-3733, is the federal Government's "primary litigative tool for combating fraud" committed by all "unscrupulous contractors and grantees." S. Rep. No. 345, 99th Cong., 2d Sess. 8 (1986), reprinted in, 1986 U.S.C.C.A.N. 5266, 5273. Under the Act, any person who, *inter alia*, knowingly presents or causes to be presented a false or fraudulent claim to the United States for payment or approval is liable to the Government for three times the amount of damages which the Government sustains because of that person's act plus penalties for each false claim submitted.

In 1986, Congress substantially amended the False Claims Act and, in particular, its *qui tam* provisions. Section 3730(b) allows any person to bring a False Claims Act suit in the name of the Government to recover damages suffered by the United States and to share in any recovery obtained as a result of the suit. The *qui tam* plaintiff, known as a relator, initiates a suit, by filing a complaint under seal in a United States District Court. Simultaneously, the relator must serve a copy of the complaint on the federal Government together with a

written disclosure statement describing all of the information and evidence in the relator's possession relating to the case. 31 U.S.C. § 3730(b)(2).

The United States then has at least 60 days to investigate the relator's allegations and determine whether to intervene and proceed with the action. *Id.*, § 3730(b)(3). If the United States intervenes, the action is conducted by the Government. *Id.*, § 3730(b)(4)(A). If the Governmen. chooses not to intervene, the relator has the right to proceed with the action in the Government's name, albeit with significant Government oversight and without the United States ever truly relinquishing control of the litigation. See *Id.*, §§ 3730(c)(2) and (3).

2. Relator Carol Rae Cooper Foulds filed this *qui tam* action under seal on August 4, 1995 in the Northern District of Texas, Lubbock Division. Foulds alleged that defendants Texas Tech University and Texas Tech University Health Sciences Center violated the FCA by submitting false claims to the United States under the federal government's Medicare and Medicaid programs (referred to jointly hereafter as "Medicare"). Specifically, relator alleged that in violation of applicable laws and regulations, defendants submitted claims to Medicare for services performed by physicians when in fact those services were performed by residents or physicians-in-training outside the presence of, and with little if any direct oversight by any physician.

In addition, Foulds alleged that her decision to come forward with her allegations of fraud led to retaliatory conduct by defendants. Accordingly, she also brought a claim under section 3730(h) of the FCA, which provides remedies for

persons retaliated against for engaging in activity in furtherance of a *qui tam* action. Foulds does not seek review of the Fifth Circuit's ruling with respect to her section 3730(h) claim.

3. On September 12, 1996, the District Court denied the United States' *ex parte* application for an extension of time to determine whether to intervene and ordered the clerk to unseal Foulds' complaint. Defendants were served on October 18, 1996. After being served with the complaint, defendants moved to dismiss contending, first, that the Eleventh Amendment precludes the suit, and second, that the state is not a "person" under the FCA. However, on January 21, 1997, before that motion was decided, the parties filed a joint motion for a stay of the proceedings. This motion was made subsequent to notification to the defendants by the Office of Inspector General of Health Care Finance Administration ("HCFA") that they would be subject to an audit under the Physicians at Teaching Hospitals ("PATH") initiative, which was then a nationwide federal effort to investigate allegations against teaching hospitals like those raised in the *qui tam* complaint Foulds had filed. Ultimately, however, Texas was excluded from the PATH initiative, and no audit took place.

Upon being notified that they would not be audited under PATH, defendants moved on August 1, 1997, to have the stay lifted so that their jurisdictional challenge to the *qui tam* action could be decided. Defendants' motion to lift the stay was granted. On September 29, 1997, the District Court further ruled that the designated time for the United States to intervene in the *qui tam* action had lapsed without the United States making an explicit election to do so, and thus that the United States had waived its right to intervene. (App. 75 - App. 76).

4. The District Court then turned its attention to defendants' motion to dismiss based on Eleventh Amendment immunity and their contention that states do not qualify as "persons" liable as defendants under the False Claims Act. In an order dated October 3, 1997, the District Court denied defendants' motion on both grounds. (App. 52 - App. 74). Defendants timely appealed, and the District Court stayed all proceedings pending the outcome of the appeal.

5. On February 18, 1998, the Fifth Circuit granted the United States' motion to intervene as a matter of right under 28 U.S.C. § 2403 as a plaintiff-appellant in the appeal so that it could defend the constitutionality of the *qui tam* provisions of the False Claims Act as they applied to state defendants.

6. On March 29, 1999, the Fifth Circuit panel reversed the district court's decision with respect to the Eleventh Amendment, holding that "when the United States has not actively intervened in the action, the Eleventh Amendment bars qui tam plaintiffs from instituting suits against the sovereign states in federal court." (App. 1 - App. 51). Because the Fifth Circuit determined that the Eleventh Amendment presented a "threshold jurisdictional issue," it did not address the statutory question of whether the state is "person" under the FCA.

REASONS FOR GRANTING THE PETITION

This case presents a question already at issue in *State of Vermont Agency of Natural Resources v. United States ex rel. Stevens*, No. 98-1828 (cert. granted June 24, 1999). Both this case and *Stevens* concern whether the Eleventh Amendment precludes a *qui tam* action if the United States initially does not

intervene in the case. Accordingly, the Court's resolution of *Stevens* will govern the disposition of this case, and the petition in this case should be held pending the decision in *Stevens* and then disposed of in light of that decision. Moreover, *Stevens* presents an additional question that, depending on the Court's ruling, may well be dispositive here. The Fifth Circuit declined to decide whether a state is a "person" under the FCA, an issue raised squarely in *Stevens*. The Court's resolution of both the Constitutional and statutory questions presented in *Stevens* will affect the outcome of this case.

I. THE CIRCUITS ARE IN CONFLICT OVER THE ELEVENTH AMENDMENT QUESTION PRESENTED.

The decision of the Fifth Circuit conflicts directly with the opinions of the Second, Fourth and Eighth Circuit Courts of Appeals[1] and stands alone in its ruling that sovereign immunity bars suits by relators under the *qui tam* provisions of the FCA. See *United States ex rel. Stevens*, 162 F.3d 195, 202 (2d Cir. 1998), cert. granted, 191 S.Ct. 2391 (June 24, 1999); *United States ex rel. Rodgers v. Arkansas*, 154 F.3d 865 (8th Cir. 1998), cert. dismissed, 119 S.Ct. 2387 (June 21, 1999); *United States ex rel. Milam v. The University of Texas M.D. Anderson*

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[1] In an opinion later vacated on other grounds, the Ninth Circuit Court of Appeals also held that the Eleventh Amendment does not bar *qui tam* suits under the FCA. See *United States ex rel. Fine v. Chevron, U.S.A., Inc., et al.*, 39 F.3d 957 (9th Cir. 1994), vacated *en banc*, 72 F.3d 740 (9th Cir. 1995), cert. denied, 116 S.Ct. 1877 (1996).

Cancer Center, 961 F.2d 46, 48 (4th Cir. 1992). The analysis of, and conclusion reached by, the majority of the Circuits is unquestionably correct.

As the Second Circuit framed it: "[t]he question for the present case is whether a *qui tam* suit under the FCA should be viewed as a private action by an individual and hence barred by the Eleventh Amendment, or one brought by the United States, and hence not barred." *Stevens*, 162 F.3d at 202. See also *Milam*, 961 F.2d at 48 ("The issue then is simply stated: is this a suit by the United States?"); *Rogers*, 154 F.3d at 868 ("We held that a *qui tam* action under this Act is a suit by the United States for Eleventh Amendment purposes"). In answering this question, the Eighth Circuit, like the Second and Fourth Circuits, looked pragmatically at the False Claims Act both in terms of its operation and its underlying purpose.

"The focus of the Act is on exposing fraud on the government and recovering resulting government losses. The *qui tam* provisions facilitate this process, but they do not alter the underlying character of the action as one for the aggrieved party as defined by the statute." *Rodgers*, 154 F.3d at 868. And the aggrieved party, as the Eighth Circuit and every other Circuit to have addressed the issue, including the Fifth, has concluded, is the United States. *Id*; *Stevens*, 162 F.3d at 202; *Searcy v. Philips Electronics North America Corp.*, 117 F.3d 154, 156 (5th Cir. 1997); *United States ex rel Hyatt v. Northrop Corp.*, 91 F.2d 1211, 1217 n.8 (9th Cir. 1996) (citing *Killingsworth v. Northrop Corp.*, 25 F.3d 715, 720 (9th Cir. 1994); *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1154 (2d Cir.), cert. denied, 508 U.S. 973 (1993); *United States ex rel. Hall Dev.*

Corp., 49 F.3d 208, 1213 (7th Cir. 1995); See also *Milam*, 961 F.2d at 49 ("the structure of the *qui tam* procedure, the extensive benefit flowing to the government from any recovery, and the extensive power the government has to control the litigation weigh heavily against the Center's position [that the Eleventh Amendment bars the action].").

In this case, the Fifth Circuit took a very different tack, adopting a crabbed and mechanical reading of both the Eleventh Amendment and the False Claims Act. The Circuit focused solely on the "commences or prosecutes" language of the Eleventh Amendment and then narrowly construed the government's role in *qui tam* cases, particularly in cases where the government has not intervened. For example, the Circuit stated that "the government retains *some* possessory rights to the proceeds of the suit," as if a seventy percent share of the damages, to which the government is at a minimum entitled (31 U.S.C. § 3730(d)(2)), is an inconsequential amount. *Foulds*, 171 F.3d at 290 (emphasis added).

The Circuit contended further that the relator not the United States determines "how, when and in what matter to make demands on a state, . . . whether to settle with a state and on what terms, etc." *Id.*, 171 F.3d at 293. But, the United States, as the Fifth Circuit itself recently held, has an unequivocal statutory right to veto any settlement negotiated by a relator, even in cases where the government has not intervened. *Searcy*, 117 F.3d at 159.

Similarly, the Fifth Circuit asserted that "[t]he fact that the government has not a penny staked in this case plays an important role in determining which party has commenced and

prosecuted the suit for Eleventh Amendment purposes." *Foulds*, 171 F.3d at 293. Yet, the record in this very case belies that assertion. First, the government expended resources investigating the allegations made by relator. Second, in this case, as it is entitled to under the statute,[2] the government requested that the parties serve the Department of Justice with all of the pleadings. Third, the government did take an active role litigating this motion below. The United States has committed resources to this litigation sufficient to give it more than a "chimerical presence" in the case. *Id.*

In fact, all *qui tam* cases, regardless of whether the government intervenes, are cases that so involve the government that, as a practical matter, they are brought and prosecuted by the United States. The False Claims Act specifically requires that *qui tam* actions be "brought in the name of the Government." 31 U.S.C. § 3730(b)(1). Moreover, *qui tam* actions under the False Claims Act are authorized only to recover funds wrongfully taken or withheld from the United States. The government, not the *qui tam* plaintiff, suffers the "injury in fact" necessary for Article III standing. *Kreindler & Kreindler*, 985 F.2d at 1154; *Milam*, 961 F.2d at 49. And, as noted, the vast majority of any money recovered by a *qui tam* plaintiff is returned to the United States Treasury. See 31 U.S.C. § 3730(d).

Even in cases where the government elects not to intervene in a *qui tam* action, numerous provisions of the False Claims Act make plain that the case is truly the United States'. First, even if the government declines to intervene initially, it

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[2] See 31 U.S.C. § 3730(c)(3).

may do so at any time during the course of litigation, upon a showing of good cause, and assert its primary authority over the prosecution of the action. See 31 U.S.C. § 3730(c)(3). This provision is especially significant where, as here, the government's "decision" not intervene was forced by a lack of time to complete an investigation rather than a definitive determination on the merits. Alternatively, the government may seek to dismiss the action "notwithstanding the objections of the person initiating the action." Id., at § 3730(c)(2)(a). If the government allows the relator to conduct the litigation on the United States' behalf, the government still retains the right to be kept informed of any or all aspects of the proceedings. Id., at § 3730(c)(3). Finally, as noted, the Attorney General of the United States always retains the right to object to a *qui tam* plaintiff's effort to dismiss a case in which the government has declined to intervene or to object to a settlement proposed on the government's behalf. Searcy, 117 F.3d at 159-160.

This degree of government involvement and control over a *qui tam* case, even when the government does not intervene in the action, led the Second, Fourth and Eighth Circuits to conclude that "a *qui tam* action under this Act is a suit by the United States for Eleventh Amendment immunity purposes." *Rodgers*, 154 F.3d at 868. Thus, the Fifth Circuit's decision conflicts both in its reasoning and outcome with the other Circuits to have considered the issue. These conflicts can only be resolved through the Court's review of the question presented by this case.

II. THE FIFTH CIRCUIT RELIES ERRONEOUSLY ON THIS COURT'S OPINION IN *BLATCHFORD V. NATIVE VILLAGE OF NOATAK.*

The Fifth Circuit recognized that the Eleventh Amendment would not apply if the False Claims Act formally established Foulds as "the deputy of the United States." *Foulds*, 171 F.3d at 290, 291. The panel then concludes that the Supreme Court's opinion in *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 784 (1991) establishes that "Congress cannot delegate to private citizens the United States' sovereign exemption from Eleventh Amendment restrictions." *Id.*, at 291-292.

Blatchford did not so hold. To be sure, in *dicta*, the Court expressed doubt "that the sovereign exemption can be delegated," *Blatchford*, 501 U.S. at 785, but the application of that sentiment to *qui tam* actions is fundamentally erroneous. The question here is not one of delegation, but of representation. Under the False Claims Act, Congress has not delegated its authority to sue states to private persons for their personal benefit alone; Congress has invited whistleblowers to take action specifically in order to benefit the federal government.

The difference between delegation and representation distinguishes the circumstances in *qui tam* litigation from those addressed by the Supreme Court in *Blatchford*. There, the question raised was not whether the United States could empower private persons to act on the Government's behalf for purposes of pursuing the federal government's claims, but whether the Government could assign to an Indian tribe for the

tribe's benefit alone the United States' power to sue states. 501 U.S. at 785-786. Because the Court concluded that Congress never intended to make such a delegation in the statute at issue, it did not decide whether Congress had the authority to do so. *Id.* The Court's comments in *dictum* about whether States have consented to suit by "anyone the United States might select," *id.*, take on a fundamentally different meaning in the context of litigation where wholly private interests — and not the interests of the United States itself — are at issue.

Thus, *Blatchford* does not stand for the proposition that the federal government cannot authorize private citizens to act on the government's behalf. Indeed, the use of *qui tam* provisions predates the founding of the Union, and during the early years of the Union, such provisions were routine in federal and state legislation. See *U.S. ex rel. Marcus v. Hess*, 317 U.S. 537, 541 (1943). See also E. Caminker, The Constitutionality of *Qui Tam* Actions, 99 *Yale L.J.* 341, 342 & nn.2&3 (1989). While it is unknown when the first *qui tam* suit against a State was filed, it is beyond dispute that the concept that private persons could be recruited legislatively to represent the government in litigation was well established at the time of the Constitutional Convention.

As the Second Circuit succinctly explained, in *Blatchford*:

> Native American tribes sued the State of Alaska, arguing that they should be allowed to bring such a suit because the United States is empowered to bring a suit for the benefit of the tribes. Plainly

> in those circumstances, however, the injury to be remedied was one to the tribes, not to the federal government, and the cause of action did not belong to the government. The Supreme Court's rejection of the contention that the tribes should be allowed to pursue their own rights in suits against the States does not persuade us that the United States may not authorize a person other than the Attorney General to bring suit against the States on behalf of the United States to assist the United States in recovering moneys of which it has been defrauded.

Stevens, 162 F.3d at 203.

CONCLUSION

The petition for writ of certiorari should be held pending the decision in *State of Vermont Agency of Natural Resources v. United States ex rel. Stevens*, No 98-1828 (cert. granted June 24, 1999) and then disposed of as appropriate in light of the decision in that case.

Respectfully submitted.

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171 F.3d 279, U.S. v. Texas Tech University, (C.A.5 (Tex.) 1999)

UNITED STATES of America, ex rel., Plaintiff-Intervenor,
Carol Rae Cooper Foulds, Plaintiff-Appellee,
v.
TEXAS TECH UNIVERSITY, et al., Defendants,
Texas Tech University; Texas Tech University Health Science
Center, Defendants-Appellants.

No. 97-11182.
United States Court of Appeals,
Fifth Circuit.
March 29, 1999.

Medical resident employed by university school of medicine brought False Claims Act (FCA) action against state university and its medical and health sciences center, asserting qui tam and retaliation claims. The United States District Court for the Northern District of Texas, Sam R. Cummings, J., 980 F.Supp. 864, denied university's and center's motion to dismiss, and they appealed. The Court of Appeals, E. Grady Jolly, Circuit Judge, held that: (1) Court of Appeals could not interpret FCA before deciding Eleventh

Amendment issue, since, inter alia, Eleventh Amendment was jurisdictional in nature; (2) Eleventh Amendment bars private citizen from instituting qui tam action against state in federal court, where United States government has not intervened; (3) resident's qui tam claim was barred by Eleventh Amendment; and (4) resident's retaliation claim was barred by Eleventh Amendment.

Reversed and remanded.

Benavides, Circuit Judge, concurred in result.

1. FEDERAL CIVIL PROCEDURE k103.4
170A ----
170AII Parties
170AII(A) In General
170Ak103.1 Standing
170Ak103.4 Rights of third parties or public.
C.A.5 (Tex.) 1999.

Uninterested third party ordinarily cannot seek relief for the United States' injuries suffered at the hands of another.

2. FEDERAL COURTS k265
170B ----
170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on
170BIV(A) In General
170Bk264 Suits Against States
170Bk265 Eleventh Amendment in general; immunity.
C.A.5 (Tex.) 1999.

To determine whether Congress has legitimately denied the states the sovereign immunity recognized under the Eleventh Amendment, a court must first determine whether Congress has unequivocally expressed its intent to abrogate the immunity, and, second, must decide whether Congress has acted pursuant to a valid exercise of power. U.S.C.A. Const.Amend. 11.

3. FEDERAL COURTS k576.1
170B ----
170BVIII Courts of Appeals
170BVIII(C) Decisions Reviewable
170BVIII(C)2 Finality of Determination
170Bk576 Particular Actions, Interlocutory Orders Appealable
170Bk576.1 In general.
C.A.5 (Tex.) 1999.

Pursuant to collateral order doctrine, Court of Appeals had jurisdiction over state university's interlocutory appeal of denial of its motion to dismiss False Claims Act (FCA) action on ground of Eleventh Amendment immunity. U.S.C.A. Const.Amend. 11; 31 U.S.C.A. § 3729 et seq.

4. FEDERAL COURTS k265
170B ----
170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on
170BIV(A) In General
170Bk264 Suits Against States
170Bk265 Eleventh Amendment in general; immunity.
C.A.5 (Tex.) 1999.

Although Court of Appeals generally would first interpret an ambiguous statute before deciding any constitutional issues, it could not do so in False Claims Act (FCA) action in which plaintiff argued that FCA created cause of action against states, and state argued that action was prohibited by Eleventh Amendment, inasmuch as Eleventh Amendment was jurisdictional in nature, Court could not consider parties' alternative arguments absent jurisdiction, and Court could not invoke "hypothetical jurisdiction." U.S.C.A. Const.Amend. 11; 31 U.S.C.A. § 3729 et seq.

5. FEDERAL COURTS k265
170B ----
170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on
170BIV(A) In General
170Bk264 Suits Against States
170Bk265 Eleventh Amendment in general; immunity.
C.A.5 (Tex.) 1999.

Eleventh Amendment's admonition is jurisdictional in nature, inasmuch as its negative instruction on how to construe federal judicial power operates as an additional boundary on that power, supplementing the restraints on judicial power already implicitly provided in article of Constitution governing judiciary. U.S.C.A. Const. Art. 3, § 1; Amend. 11.

6. FEDERAL COURTS k97
170B ----
170BII Venue
170BII(A) In General

170Bk97 Determination of venue questions.
C.A.5 (Tex.) 1999.

Courts must decide issues of personal jurisdiction before ruling on the merits.

7. COURTS k96(4)
106 ----
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k88 Previous Decisions as Controlling or as Precedents
106k96 Decisions of United States Courts as Authority in Other United States Courts
106k96(4) Conclusiveness of decisions of Court of Appeals within its circuit.
C.A.5 (Tex.) 1999.

Where two Fifth Circuit panel decisions conflict, the prior decision constitutes the binding precedent.

8. FEDERAL COURTS k756.1
170B ----
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk756 Matters Not Necessary to Decision in Review
170Bk756.1 In general.
C.A.5 (Tex.) 1999.

Court of Appeals cannot rule on merits question before, or in addition to, answering jurisdictional question, inasmuch

as such ruling would contravene principle that federal courts may not issue advisory opinions.

9. COURTS k40
106 ----
106I Nature, Extent, and Exercise of Jurisdiction in General
106k40 Acts and proceedings without jurisdiction.
C.A.5 (Tex.) 1999.

Court of Appeals cannot hold that it possesses no authority to hear a case, and then proceed to decide the statutory issue presented in the case through considering arguments presented in the alternative.

10. FEDERAL COURTS k542
170B ----
170BVIII Courts of Appeals
170BVIII(B) Appellate Jurisdiction and Procedure in General
170Bk542 Determination of question of jurisdiction.
C.A.5 (Tex.) 1999.

Court of Appeals cannot, through doctrine of "hypothetical jurisdiction," assume jurisdiction to decide that statute creates no cause of action and then brush away the jurisdictional question as unnecessary to address for the reason that, in either event, the sum of the relief granted equals zero.

11. FEDERAL COURTS k542
170B ----
170BVIII Courts of Appeals
170BVIII(B) Appellate Jurisdiction and Procedure in General
170Bk542 Determination of question of jurisdiction.
C.A.5 (Tex.) 1999.

On every writ of error or appeal, the first and fundamental question is that of jurisdiction.

12. COURTS k40
106 ----
106I Nature, Extent, and Exercise of Jurisdiction in General
106k40 Acts and proceedings without jurisdiction.
C.A.5 (Tex.) 1999.

Without jurisdiction a federal court cannot proceed at all in any cause.

13. COURTS k40
106 ----
106I Nature, Extent, and Exercise of Jurisdiction in General
106k40 Acts and proceedings without jurisdiction.
C.A.5 (Tex.) 1999.

Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.

14. FEDERAL COURTS k542
170B ----
170BVIII Courts of Appeals
170BVIII(B) Appellate Jurisdiction and Procedure in General
170Bk542 Determination of *279 question of jurisdiction.
C.A.5 (Tex.) 1999.

Court of Appeals must consider possible objections to standing sua sponte.

15. FEDERAL COURTS k3.1
170B ----
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk3 Jurisdiction in General; Nature and Source
170Bk3.1 In general.
C.A.5 (Tex.) 1999.

Determination that statute creates no cause of action under which the plaintiff may proceed is not relevant to determination whether court has subject-matter jurisdiction over suit.

16. FEDERAL COURTS k776
170B ----
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 Trial de novo.
C.A.5 (Tex.) 1999.

Eleventh Amendment immunity determinations, like other questions of subject matter jurisdiction, are reviewed de novo as questions of law. U.S.C.A. Const.Amend. 11.

17. FEDERAL COURTS k269
170B ----
170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on
170BIV(A) In General
170Bk268 What Are Suits Against States
170Bk269 State officers or agencies, actions against.
C.A.5 (Tex.) 1999.

Eleventh Amendment cloaks Texas Tech University and Texas Tech University Health Sciences Center with sovereign immunity as state institutions. U.S.C.A. Const.Amend. 11.

18. UNITED STATES k122
393 ----
393VIII Claims Against United States
393k120 Making or Presentation of False Claims and Other Offenses Relating to Claims
393k122 Penalties and actions therefor.
C.A.5 (Tex.) 1999.

No legal duty prevents qui tam plaintiff bringing action under False Claims Act (FCA) from furthering his or her own interests to the detriment of the United States' interests. 31 U.S.C.A. § 3729 et seq.

19. FEDERAL COURTS k272
170B ----

170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on
170BIV(A) In General
170Bk268 What Are Suits Against States
170Bk272 Injunctive or mandatory relief; declaratory judgments.
C.A.5 (Tex.) 1999.

Notwithstanding Eleventh Amendment, citizens may, generally, pursue prospective injunctive relief in federal court against state officials. U.S.C.A. Const.Amend. 11.

20. FEDERAL COURTS k265
170B ----
170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on
170BIV(A) In General
170Bk264 Suits Against States
170Bk265 Eleventh Amendment in general; immunity.
C.A.5 (Tex.) 1999.

Eleventh Amendment bars private citizen from instituting qui tam action on behalf of United States against state in federal court, where United States government has not intervened in action. U.S.C.A. Const.Amend. 11.

21. FEDERAL COURTS k265
170B ----
170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on
170BIV(A) In General
170Bk264 Suits Against States

170Bk265 Eleventh Amendment in general; immunity.
C.A.5 (Tex.) 1999.

United States cannot delegate to non-designated, private individuals its sovereign ability to evade the prohibitions of the Eleventh Amendment. U.S.C.A. Const.Amend. 11.

22. FEDERAL COURTS k269
170B ----
170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on
170BIV(A) In General
170Bk268 What Are Suits Against States
170Bk269 State officers or agencies, actions against.
C.A.5 (Tex.) 1999.

Medical resident's qui tam action under False Claims Act (FCA) against state university school of medicine, in which United States government had not intervened, was barred by Eleventh Amendment, inasmuch as FCA did not unequivocally express congressional intent to abrogate states' sovereign immunity. U.S.C.A. Const.Amend. 11; 31 U.S.C.A. § 3729.

23. FEDERAL COURTS k269
170B ----
170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on
170BIV(A) In General
170Bk268 What Are Suits Against States
170Bk269 State officers or agencies, actions

against.
C.A.5 (Tex.) 1999.

Medical resident's retaliation claim under False Claims Act (FCA) against state university school of medicine, in which United States government had not intervened, was barred by Eleventh Amendment, inasmuch as resident, not United States, "commenced and prosecuted" action within meaning of Eleventh Amendment. U.S.C.A. Const.Amend. 11; 31 U.S.C.A. § 3730(h).

***281** Peter Wilson Chatfield, Mary Louise Cohen, Phillips & Cohen, Washington, DC, Mark Alan Wilson, Smith, Storrs, Wilson & McConnell, Amarillo, TX, Randall Bruce Pyles, Burgess & Pyles, Plainview, TX, for Plaintiff-Appellee.

Michael Eugene Robinson, Douglas N. Letter, U.S. Department of Justice, Civil Division, Appellate Staff, Washington, DC, for Plaintiff-Intervenor.

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Priscilla R. Budeiri, Taxpayers Against Fraud, The False Claims Act Legal Center, Washington, DC, for Taxpayers Against Fraud, The False Claims Act Legal Center, Amicus Curiae.

Appeal from the United States District Court for the Northern District of Texas.

Before JOLLY, BARKSDALE and BENAVIDES, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

This appeal speaks of a qui tam action brought by Carol Rae Cooper Foulds, on behalf of the United States, against Texas Tech University and Texas Tech University Health Sciences Center for violations of the False Claims Act, 31 U.S.C. § 3729 et seq. (West Supp.1998). We must initially decide a jurisdictional issue — whether under the Eleventh Amendment private citizens acting as qui tam plaintiffs can institute such suits against the sovereign states. Because we hold that the Eleventh Amendment bars this suit, we lack the constitutional authority to decide the second — and broader — issue presented in this appeal of whether the False Claims Act creates a cause of action, at all (whether by an individual or the United States government), against an individual state when that state knowingly submits false or fraudulent claims for payment to the United States. In short, we simply hold that the Eleventh Amendment divests the federal courts of

jurisdiction over this qui tam action brought against Texas Tech University and Texas Tech University Health Sciences Center ("Texas defendants").

I

A

Foulds possesses information that she believes will bring to light a massive number of fraudulent claims submitted to the ***282** United States. She obtained this information as a dermatology resident at the Texas Tech Health Sciences Center ("TTHSC"). Foulds worked at various clinics run by TTHSC. She examined patients, made diagnoses, and prescribed treatment for patients. Resident physicians performed these services, Foulds alleges, without any supervision by the staff physicians. She says that after residents had rendered these services without oversight, staff physicians routinely signed patient charts and Medicare/ Medicaid billing forms certifying that the services were personally performed by the staff physicians or by the staff physicians' employees under their personal direction. Foulds alleges no simple clerical error. Indeed, she estimates that the defendants have submitted almost one-half million false claims over a period of ten years.

This alleged falsification of documents forms the basis for Foulds's action under the False Claims Act ("FCA" or "Act"). That Act creates civil liability for, *inter alia*, "[a]ny *person* who knowingly presents, or causes to be presented, to an officer or employee of the United States Government ... a

false claim for payment or approval." 31 U.S.C. § 3729(a)(1) (emphasis supplied). (FN1) Foulds and the United States argue that the term "person" includes a state. The Texas defendants disagree, arguing that "person" does not include a sovereign state.

[1] Aside from the question of whether the Act's language subjects states to potential liability, Foulds has other hurdles to clear. An uninterested third party ordinarily cannot seek relief for the United States' injuries suffered at the hands of another. *See, e.g., Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982) (recognizing the principle that a plaintiff generally must assert his own rights, and not the rights of third parties). Many a good citizen, without hope of personal reward, might choose to expose such corruption to allow the government to recoup its losses. The FCA, however, provides a mechanism to coax the less altruistic to come forward. Section 3730(b) of the Act allows private persons to "bring a civil action for a violation of § 3729 for the person and for the United States Government." 31 U.S.C. § 3729(b)(1). To be sure, the statute provides for what can amount to massive rewards for a person who undertakes this task. (FN2)

For hundreds of years, these proceedings have been labeled "qui tam" actions. (FN3) A qui tam plaintiff under the FCA must file her complaint under seal and deliver copies of the complaint to the United States. *Id.*, § 3730(b)(2). The United States then must decide within sixty days, unless granted an extension, whether to intervene and prosecute the

action itself or whether to take on a passive role and allow the qui tam plaintiff (also called a "relator") to prosecute the action. *Id.*, § 3730(b)(4). In the instant case, the ***283** United States has not intervened in the action leading to this appeal.

B

This appeal presents an additional claim. According to Foulds, her decision to blow the whistle on the allegedly fraudulent activities led to retaliatory conduct by the chairman of the dermatology department. (FN4) Foulds contends that she first notified Texas Tech University's general counsel of the false claims in the fall of 1993. She alleges that soon thereafter she received derogatory memoranda from the chairman of the dermatology department and was subsequently placed on probation. Section 3730(h) of the FCA provides remedies for those employees harassed by their employers because of lawful acts performed in furtherance of qui tam actions under the Act. The "employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection." 31 U.S.C. § 3730(h).

II

Foulds filed her complaint with the district court in August of 1995. This complaint remained under seal until the district court issued an order in September of 1996, denying the United States' request for an extension of time during which it could determine whether to intervene. (FN5) According to assertions made by the United States at oral

argument, the federal government simply did not have the time necessary to determine whether this case warranted its intervention. Shortly after the district court issued the order denying the government's request for an extension, two of the defendants, Texas Tech University and Texas Tech Health Sciences Center ("Texas defendants"), (FN6) filed a motion to dismiss the qui tam action pursuant to Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure. The Texas defendants based their motion to dismiss on four arguments: (1) the Eleventh Amendment precludes a private citizen from bringing a qui tam suit against the sovereign states for alleged violations of the FCA; (2) the Eleventh Amendment bars private citizens from naming states as defendants to a claim seeking a retaliation remedy under § 3730(h) of the FCA; (3) states are not "persons" for purposes of the FCA; and (4) Foulds failed to plead fraud with particularity. (FN7)

The district court denied the Texas defendants' motion to dismiss. Noting that a ruling on a 12(b)(1) motion to dismiss for lack of subject matter jurisdiction must precede any decisions on other Rule 12 motions, the court first addressed the defendants' Eleventh Amendment arguments.

[2] The Texas defendants argued that the principles recognized in *Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), apply to this case. In *Seminole Tribe,* the Supreme Court announced a two-step analysis for determining whether Congress has legitimately denied the states the sovereign immunity recognized under the Eleventh Amendment. First, a court must ***284** determine whether "Congress has 'unequivocally

expresse[d] its intent to abrogate the immunity.' " *Id.* at 55, 116 S.Ct. 1114 (citation omitted). Second, the court must decide "whether Congress has acted 'pursuant to a valid exercise of power.' " *Id.* (citation omitted). With regard to the second inquiry, the Supreme Court held that Congress could not abrogate Eleventh Amendment immunity simply by enacting legislation under its general grant of Article I legislative powers. *Id.* at 72-73, 116 S.Ct. 1114. Controlling Supreme Court precedent has recognized only one valid source of Congressional power that would allow the abrogation of a state's immunity from suit by its citizens: s 5 of the Fourteenth Amendment. *Id.* at 59, 72-73, 116 S.Ct. 1114. The Texas defendants have argued that, with respect to the False Claims Act, Congress' only source of legislative power is Article I. Consequently, there has been no abrogation of the Eleventh Amendment bar to this suit.

The district court quickly brushed aside the applicability of *Seminole Tribe.* The court decided that it need not address *Seminole Tribe* 's holding because the defense of sovereign immunity from suit under the Eleventh Amendment was not presented here inasmuch as the Eleventh Amendment did not apply to suits by the United States against a state, which, it held, a qui tam action is in fact. *United States ex rel. Foulds v. Texas Tech Univ.*, 980 F.Supp. 864, 870 (N.D.Tex.1997). In reaching this conclusion, the district court followed the path of the Fourth Circuit in *United States ex rel. Milam v. University of Texas M.D. Anderson Cancer Ctr.*, 961 F.2d 46 (4th Cir.1992) ("*Milam* "). The *Milam* court decided first that the United States was the "real party in interest" in qui tam suits under the FCA. It then leapt to the conclusion that states

have no sovereign immunity defense against a private citizen relator — even if the United States chose not to intervene — because states possess no immunity from suits brought by the United States. Thus, the district court found that *Seminole Tribe* had no bearing on this action against the Texas defendants; those defendants simply had no sovereign immunity defense in qui tam actions. *Foulds,* 980 F.Supp. at 870.

The district court then decided that rejection of the Eleventh Amendment challenge to Foulds's § 3730(h) retaliation claim easily followed. Although the United States would reap no monetary award pursuant to a successful retaliation claim, the district court found that

> [i]f section 3730(h) is eviscerated, then the Government is truly the one that will suffer the greatest harm. This is because a "whistleblower" will not be encouraged to come forward with information for fear of being retaliated against.

Id. at 871. Thus, the district court reasoned that sovereign immunity should not prevent the § 3730(h) action against the Texas defendants.

Having disposed of the Eleventh Amendment issues, the district court proceeded to address the remaining question: Does the term "person," under the FCA, encompass states? Although it recognized that courts ordinarily do not understand the term "person" to include the sovereign states, the court rejected this general rule because

> this would be an illogical step to make in light of [the district] court's finding that the Eleventh Amendment does not bar Foulds's suit against [the Texas defendants].

Id. at 871. This somewhat questionable reasoning (FN8) led the district court to dismiss the Texas defendants' 12(b)(6) motion.

***285** [3] After issuing its order denying the Texas defendants' motions, the district court issued a stay pending this interlocutory appeal. We have jurisdiction over this interlocutory appeal pursuant to the collateral order doctrine. *See Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147, 113 S.Ct. 684, 121 L.Ed.2d 605 (1993) (holding that "States and state entities ... may take advantage of the collateral order doctrine to appeal a district court order denying a claim of Eleventh Amendment immunity").

III

A

[4] We begin and end with the jurisdictional question presented by the Eleventh Amendment. Generally, our court would first interpret the ambiguous statute before deciding any constitutional issues. Indeed, courts' interpretive results are often influenced by their desire to avoid potential constitutional problems. *See, e.g., Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 348, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring); *United States v.*

Reeves, 752 F.2d 995, 1001 (5th Cir.1985). Precisely because this has been the ordinary approach (deciding the statutory question before the constitutional question), we think it is jurisprudentially important to discuss first the reasons for disregarding it in this case.

[5] [6] [7] The Eleventh Amendment's admonition is jurisdictional in nature:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. While often noted for preserving state sovereignty, the Amendment only accomplishes this end through jurisdictional limitation. *Puerto Rico Aqueduct,* 506 U.S. at 144, 113 S.Ct. 684 ("[The Eleventh Amendment's] withdrawal of jurisdiction effectively confers an immunity from suit.") Its negative instruction on how to construe federal judicial power operates as an additional boundary on that power, supplementing the restraints on judicial power already implicitly provided in Article III of the Constitution. *See Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 238, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985) (quoting *Pennhurst State Sch. and Hosp. v. Halderman,* 465 U.S. 89, 98, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984)) ("[T]he significance of [the Eleventh Amendment] 'lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III' of the Constitution."). (FN9)

It is the Eleventh Amendment's ***286** restraint on "Judicial power" that requires us to confront the Eleventh Amendment before employing our power to interpret statutory text.

[8] [9] Although parties may (and do in this case) present their arguments in the alternative, we cannot hand down a decision in this fashion. To rule on a merits question before, or in addition to, answering the omnipresent jurisdictional question would contravene the well-established principle that the federal courts may not issue advisory opinions. *See Marathon Oil Co. v. A.G. Ruhrgas,* 145 F.3d 211, 222-23 (5th Cir.) (en banc) ("*Ruhrgas* ") (adopting the reasoning in *Rhulen Agency, Inc. v. Alabama Ins. Guar. Ass'n,* 896 F.2d 674 (2d Cir.1990), which stated that when a defendant moves for dismissal under Rule 12(b)(1), and on other grounds, the court should consider the 12(b)(1) motion first since other defenses become ***287** moot and need not be determined if the court must dismiss the complaint for lack of subject matter jurisdiction), *cert. granted,* --- U.S. ----, 119 S.Ct. 589, 142 L.Ed.2d 532 (1998). In sum, we cannot hold that we possess no authority to hear a case, and then proceed to decide the statutory issue presented in the case. *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 118 S.Ct. 1003, 1016, 140 L.Ed.2d 210 (1998); *Ruhrgas,* 145 F.3d at 216 ("[O]ur jurisdiction must be considered at the outset of a case.").

[10] [11] [12] [13] [14] Nor can we assume jurisdiction to decide that the statute creates no cause of action and then brush away the jurisdictional question as unnecessary to address for the reason that, in either event, the sum of the

relief granted equals zero. The Supreme Court has recently, and flatly, rejected any "doctrine of hypothetical jurisdiction" (FN10) required for such a holding. *Steel Co.*, 118 S.Ct. at 1012. (FN11) Under this hypothetical approach, courts assumed, usually for the sake of simplicity, that they possessed jurisdictional authority over the case, and then decided whether the relevant statute created a cause of action. *See, e.g., United States v. Tonry,* 605 F.2d 144, 148 n. 12 (5th Cir.1979); *Smith v. Avino,* 91 F.3d 105, 108 (11th Cir.1996); *Browning-Ferris Indus. v. Muszynski,* 899 F.2d 151, 154-60 (2d Cir.1990). As the Supreme Court has decided, however, this approach is flawed, for "[o]n every writ of error or appeal, the first and fundamental question is that of jurisdiction ..." *Steel Co.*, 118 S.Ct. at 1012 (quoting *Great Southern Fire Proof Hotel Co. v. Jones,* 177 U.S. 449, 453, 20 S.Ct. 690, 44 L.Ed. 842 (1900)). Furthermore,

> [w]ithout jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.

***288** *Ex parte McCardle,* 74 U.S. (7 Wall.) 506, 514, 19 L.Ed. 264 (1868); *Steel Co.*, 118 S.Ct. at 1016 ("For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires."). (FN12)

[15] Accordingly, if the Eleventh Amendment removes our jurisdictional authority to hear Foulds's case, we have no

power to determine whether the False Claims Act creates a cause of action against states--i.e., whether states are "person[s]" under the Act. *See Blatchford v. Native Village of Noatak*, 501 U.S. 775, 788 n. 5, 111 S.Ct. 2578, 115 L.Ed.2d 686 (1991) ("Because we find that s 1362 does not enable tribes to overcome Alaska's sovereign immunity, we express no view on whether these respondents qualify as 'tribes' within the meaning of that statute."). Even though our reading of "person" might foreclose any possibility of a private citizen bringing a FCA qui tam action against the state of Texas, this possible result does not convert the statutory issue into a jurisdictional one. A determination that the relevant statute creates no cause of action under which the plaintiff may proceed says nothing about a court's subject-matter jurisdiction over the suit. *Steel Co.*, 118 S.Ct. at 1010 ("It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, i.e., the courts' statutory or constitutional power to adjudicate the case.").

B

1

[16] We now attend to the threshold jurisdictional issue: whether a private citizen may institute a suit — on behalf of the United States--against a state in federal court. The facts of this case necessarily limit our inquiry to the situation in which a private citizen brings the qui tam action and the United States government has not intervened. (FN13) We review Eleventh Amendment immunity determinations, like

other questions of subject matter jurisdiction, de novo as a question of law. *Ussery v. Louisiana,* 150 F.3d 431, 434 (5th Cir.1998).

[17] As a matter of helpful repetition, we again set out the text of the Eleventh Amendment:

> ***289** The Judicial power of the United States shall not be construed to extend to any suit in law or equity, *commenced or prosecuted* against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI (emphasis added). The Supreme Court has interpreted this amendment to bar citizens from suing their own states as well as other states. *Hans v. Louisiana,* 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890). We must therefore apply the seemingly plain proposition of the Eleventh Amendment to the arguments advanced by Foulds and the United States that this case was not "commenced or prosecuted" by a citizen, but instead by the United States itself. In actuality, it is as plain as the sun that this suit was not commenced by the United States and that the United States has not intervened to prosecute the case. It is true however, that Foulds, pursuant to statutory authority, has brought this suit in the name of and on behalf of the United States to recover damages for it for injuries it has suffered. Thus, although it is clear — to track the language of the Eleventh Amendment — that Foulds is a citizen who has commenced a suit against Texas, we cannot conclude our inquiry so abruptly. We must explore the more subtle

question: Has Foulds, in her capacity as a *private citizen,* commenced or prosecuted a suit against the state of Texas? (FN14)

By first asking who has commenced or prosecuted the suit against Texas, our starting point differs from that of the four other circuit courts that have addressed this issue. Those courts began their analyses by first determining that the United States is the "real party in interest" in qui tam actions. Then, they conclude that because the states enjoy no sovereign immunity from the United States, (FN15) the Eleventh Amendment does not apply. *United States ex rel. Rodgers v. Arkansas,* 154 F.3d 865, 868 (8th Cir.1998); *United States ex rel. Stevens v. Vermont Agency of Natural Resources,* 162 F.3d 195, 201-03 (2d Cir.1998); *United States ex rel. Fine v. Chevron, U.S.A., Inc.,* 39 F.3d 957, 963 (9th Cir.1994), *vacated,* 72 F.3d 740 (9th Cir.1995); *Milam,* 961 F.2d at 50. But these decisions provide no reasons or authority for equating *a* (FN16) real party in interest with the party who "commences or prosecutes" the suit. Deciding whether it is Foulds or the United States that has commenced this suit requires, we believe, a harder look than simply recognizing that the United States is a real party in interest.

The question allows no easy answer. One reason for the perplexity is that Congress has not, in this respect, specified the contours of the relationship between the qui tam plaintiff and the United States. ***290** At one end of the spectrum, the United States could simply assign the cause of action to the qui tam plaintiff, yielding complete control and ownership of the suit. *Compare United States ex rel. Kelly v. The Boeing*

Co., 9 F.3d 743, 748 (9th Cir.1993) ("We conclude that Congress intended to assign the government's fraud claims to individual qui tam plaintiffs in cases where the government itself chooses not to pursue such claims."); *with Louisiana Dept. of Transp. and Dev. v. PNL Asset Management Co. (In re Estate of Fernandez)*, 123 F.3d 241, 245-46 (5th Cir.) (private party cannot escape sovereign immunity defense when United States agency sold that party the judgment forming the basis of a bankruptcy adversarial proceeding), *modified*, 130 F.3d 1138 (5th Cir.1997) ("*Fernandez* "). At the other end of the spectrum, the United States could formally deputize each individual qui tam plaintiff so that the relator remains under the full control of, and acts first and foremost in the interests of, the United States. *Cf. Milam*, 961 F.2d at 49 ("Congress has let loose a posse of ad hoc deputies ...").

[18] Contrary to language in the cases just cited, neither of those two concepts — at the respective ends of our spectrum — accurately describes the relationship: (FN17) The government retains some control over the qui tam suit commenced by the plaintiff, *see, e.g.*, 31 U.S.C. § 3730(c)(3) (United States may intervene upon showing of good cause), but does not exercise authoritative control over the case, *see, e.g., id.* § 3730(c)(1) (relator has the right to remain a party to the suit even if the government intervenes). The government retains some possessory rights to the proceeds of the suit, *see id.* § 3730(d)(2) (fixing the relator's maximum share of proceeds at thirty percent), but cannot claim rights to all of the proceeds, *see id.* § 3730(d) (establishing relator's minimum percentage share of the proceeds). The FCA does

expressly assign some authority to institute suits in the name of the government, *see id.* § 3730(b) ("A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government."), but the government does not expect that the relator will act first and foremost with the government's interests in mind, *see e.g., United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139 (9th Cir.1998) (discussing government's effort to end industry war by intervening in over twenty FCA suits between competing citrus companies). (FN18) However we may describe and ***291** weigh the respective roles of the government and the qui tam plaintiff under the False Claims Act, we still must decide whether it can be said that this suit was commenced or prosecuted by the United States for Eleventh Amendment purposes.

2

Preliminarily, we note that even though the United States may be a relevant "party" in this suit for some purposes of the litigation, the Federal Government certainly is not the acting party-of-record in this suit. Our court's precedent commands this view. In *Searcy v. Philips Electronics North America Corp.*, 117 F.3d 154, 156 (5th Cir.1997), we faced the question whether the United States could appeal a district court's settlement approval when the government had not yet intervened in the qui tam action. We found that the United States — although *a* real party in interest — was not a party for purposes of appeal. (FN19) *Id.* at 156. We based this conclusion on our view that the FCA's

> structure distinguishes between cases in which the United States is an active participant and cases in which the United States is a *passive beneficiary* of the relator's efforts. [Thus,] when the government chooses to remain passive, as it [had in *Searcy*], we [saw] no reason to treat it as a party with standing to challenge the district court's action as of right.

Id., at 156 (emphasis added); *see also Avco Corp. v. United States Dept. of Justice,* 884 F.2d 621, 623-24 (D.C. Cir.1989) (interpreting the word "commences," as used in the FCA, so that the relator's act of commencing an action does not equate to the Attorney General commencing an action). Just as in *Searcy,* the United States has chosen to remain inactive in the prosecution of this case. Where the United States has opted for this passive role, it is difficult to treat it as the party that has "commenced or prosecuted" the suit. *Cf.* 31 U.S.C.A. § 3730(b)(4)(B) (giving the relator "the right to conduct the action" when the government declines to assume control); *Searcy,* 117 F.3d at 160 ("A relator has 'conducted' an action if he devises strategy, executes discovery, and argues the case in court ..."). To say the least, a "passive party" is certainly a contradictory description for a party who "commences" or "prosecutes" the suit. (FN20)

3

The only argument raised to challenge the facial assumption that Foulds actually "commenced and prosecuted" this action as a private citizen is that the FCA establishes

Foulds as the deputy of the United States. (FN21) The Supreme Court has made ***292** clear, however, that Congress cannot delegate to private citizens the United States' sovereign exemption from Eleventh Amendment restrictions.

In *Blatchford,* the Court held that the Eleventh Amendment bars federal court suits by Indian tribes against a state. *Blatchford,* 501 U.S. at 782, 111 S.Ct. 2578. The tribes argued that the United States had delegated to the tribes its authority to bypass the Eleventh Amendment and to thus sue the states in federal courts. The tribes first pointed out that the Supreme Court had previously recognized the authority of the United States to bring claims against states to enforce rights of Indian tribes. *Id.* at 783, 111 S.Ct. 2578. Next, the tribes argued that a jurisdictional statute, 28 U.S.C. § 1362, (FN22) delegated to Indian tribes the United States' power to press their claims notwithstanding the states' Eleventh Amendment sovereign immunity. *Blatchford,* 501 U.S. at 783, 111 S.Ct. 2578. (FN23) Because the Eleventh Amendment does not bar the United States from suing the states in federal court, the tribes argued, it also does not bar delegates of the United States (pursuant to § 1362) from commencing an action in the federal courts. The Supreme Court rejected this argument:

> We doubt ... that the sovereign exemption can be delegated ... The consent "inherent in the convention," to suit by the United States--at the instance and under the control of responsible federal officers--is not consent to suit by anyone whom the United States might select ...

Id. at 785, 111 S.Ct. 2578. *See also* The Federalist No. 81, at 455 (Alexander Hamilton) (Isaac Kramnick ed., 1987) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent.* ... Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States...."); *Stevens,* 162 F.3d at 224 (Weinstein, J., dissenting) (stating that the federal government's power to sue a state in federal court is nontransferable); *Rodgers,* 154 F.3d at 869 (Panner, J., dissenting) (same). To be sure, our circuit has been explicit that "there must be a clear expression of purpose to abrogate the Eleventh Amendment in any extension of agency status to a private party for the purpose of jurisdiction." *Fernandez,* 130 ***293** F.3d at 1139. The FCA contains no such clear expression.

As the Supreme Court has suggested in *Blatchford,* the principle of federalism embodied in both the Constitution and the Eleventh Amendment reflects an understanding between two sovereign authorities — the Federal Government and the respective states — that state sovereignty is surrendered only to another sovereign, the United States, which, of course, acts through "responsible federal officers." Qui tam plaintiffs cannot qualify as surrogates of "responsible federal officers" who have the right to represent the sovereign to sue the respective states. Indeed, the Supreme Court has recognized this fact. In a recent case, it stated that "[a]s a class of plaintiffs, qui tam relators are different *in kind* than the Government. They are motivated primarily by prospects of monetary reward rather than the public good." *Hughes Aircraft Co. v. United States ex rel. Schumer,* 520 U.S. 939,

117 S.Ct. 1871, 1877, 138 L.Ed.2d 135 (1997) (unanimous opinion) (emphasis added). Importantly, the Supreme Court specifically noted "[t]hat [just because] a quit tam suit is brought by a private party 'on behalf of the United States,' does not alter the fact that a relator's interests and the Government's do not necessarily coincide." *Id.* at 1877 n. 5. This realistic portrayal of qui tam plaintiffs comports with the rationale behind the FCA provisions as articulated by Senator Howard, the sponsor of the original bill preceding the FCA:

> I have based the enforcement provisions upon the old-fashioned idea of holding out a temptation, and "setting a rogue to catch a rogue," which is the safest and most expeditious way I have ever discovered of bringing rogues to justice.

Cong. Globe, 37th Cong., 3d Sess. 955-56 (1863). Furthermore, Sir Edward Coke's class description of qui tam plaintiffs hardly suggests a historical understanding of relators as responsible representatives of the sovereign. He described the common informers who institute penal actions for the government as "viperous vermin" that prevent "[t]he King [from] commit[ting] the sword of his justice or the oil of his mercy." Gerald Hurst, *The Common Informer,* 147 Contemp. Rev. 189-90 (1935). In short, these descriptions of the historical qui tam plaintiff undermine the concept that she is deputized to stand in for the "responsible federal officers" to whom the states have surrendered their sovereign rights.

[19] Furthermore, rogue or not, the qui tam plaintiff is surely no mere opportunistic bystander in the litigation,

irrespective of whose name the litigation may bear. With the merely chimerical presence of the United States in this case, the relator's significant control over the litigation process plainly impinges on state sovereignty. It is Foulds — not the United States as sovereign — who controls all strategic litigation decisions in the case such as how, when and in what manner to make demands on a state, whether to sue a state, how far to push the state toward a jury trial in extended litigation, whether to settle with a state and on what terms, etc.; and it is Foulds who maintains *sole* responsibility for financing the litigation and for its costs. *See* 31 U.S.C. § 3730(f) ("The Government is not liable for expenses which a person incurs in bringing an action under this section."). The fact that the government has not a penny staked in this case plays an important role in determining which party has commenced and prosecuted the suit for Eleventh Amendment purposes. *See New Hampshire v. Louisiana,* 108 U.S. 76, 89, 2 S.Ct. 176, 27 L.Ed. 656 (1883) (where private citizens funded the litigation, Eleventh Amendment barred suit brought in the name of a state, on behalf of those private citizens, against another State). Unless the United States commits its own resources — both personnel and money that are under its authority and control — private citizens should not be able to sidestep the Eleventh Amendment ***294** and hail the sovereign states into federal court. (FN24)

4

[20] [21] In sum, we hold that when the United States has not actively intervened in the action, the Eleventh Amendment bars qui tam plaintiffs from instituting suits

against the sovereign states in federal court. The United States' decision to maintain a passive role compels us to conclude that the private citizen, not the United States, has "commenced or prosecuted" the suit. Furthermore, the United States cannot delegate to non-designated, private individuals its sovereign ability to evade the prohibitions of the Eleventh Amendment. Only "responsible federal officers," or those who act at their instance and under their control, may exercise the authority of the United States as sovereign. Foulds does not qualify.

C

[22] Having decided that a private citizen has commenced and prosecuted this action against a sovereign state within the meaning of the Eleventh Amendment's proscription, our remaining task is to apply the dictates of *Seminole Tribe:*

> In order to determine whether Congress has abrogated the States' sovereign immunity, we ask two questions: first, whether Congress has "unequivocally expresse[d] its intent to abrogate the immunity," and second, whether Congress has acted "pursuant to a valid exercise of power."

Seminole Tribe, 517 U.S. at 55, 116 S.Ct. 1114 (citations omitted).

In *Scott v. University of Mississippi,* 148 F.3d 493 (5th Cir.1998), we stated the requirements for finding

Congressional intent to abrogate the States' sovereign immunity:

> Congress's intent to abrogate state sovereign immunity "must be obvious from 'a clear legislative statement.' " Congress may abrogate state sovereign immunity "only by making its intention unmistakably clear in the language of the statute." "A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment." Instead, both the text and structure of the statute must "make[ ] it clear that the State is the [intended] defendant in the suit." Congress is not required, however, to "explicitly reference to state sovereign immunity or the Eleventh Amendment."

Id., 148 F.3d at 499 (citations omitted).

Foulds has not argued that the FCA "unequivocally expresse[s]" a congressional intent to abrogate the states' sovereign immunity. Neither have we found any such clear intent, as no relevant provision of the Act explicitly mentions states as defendants. *Cf. Seminole Tribe,* 517 U.S. at 57, 116 S.Ct. 1114 ("[W]e think that the numerous references to the 'State' in the text of § 2710(d)(7)(B) make it indubitable that Congress intended through the Act to abrogate the States' sovereign immunity from suit."). We need not proceed any further than this. The Eleventh Amendment bars Foulds's § 3729 claim against the Texas defendants.

D

[23] We must next consider the Eleventh Amendment implications for Foulds's ***295.**§ 3730(h) anti-retaliation claim. (FN25) We conclude that she has "commenced or prosecuted", within the meaning of the Eleventh Amendment, a suit against the Texas defendants for this alleged violation of § 3730(h). Consequently, this claim must be dismissed as well.

Foulds's argument that the United States is also a real party in interest in a § 3730(h) claim is, it seems to us, far more of a stretch than the claim we have just dismissed. The only support she offers for this argument is that the United States has an interest in protecting those who prosecute actions on the United States' behalf. (The United States, which has argued alongside Foulds for purposes of this appeal, leaves her on her own when she makes this argument.) Even if we assume that the claim was not dependent upon her ability to prosecute this case, there are significant independent reasons that lead to our rejection of this claim. The qui tam plaintiff keeps all of the proceeds from any successful § 3730(h) claim; indeed, only a qui tam plaintiff possesses the right to bring such a claim. Therefore, even if we accepted a "real party in interest" analysis for determining whether the Eleventh Amendment applies in this case, Foulds's § 3730(h) claim nevertheless would be barred. *See Bankston v. Burch,* 27 F.3d 164, 167 (5th Cir.1994) (party possessing the right sought to be enforced is the real party in interest). Any collateral interest the United States might have in protecting qui tam plaintiffs simply cannot trump the

Eleventh Amendment. (FN26)

IV

For all of the foregoing reasons, we REVERSE the district court's order denying the Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction over the suit, and we REMAND for an entry of a judgment dismissing the complaint as to Texas Tech University and Texas Tech University Health Sciences Center.

REVERSED and REMANDED for Entry of Judgment Dismissing Appellants.

BENAVIDES, Circuit Judge, concurs in result.

FN1. The Act sets the penalty for violating this provision between $5,000 and $10,000, plus three times the amount of damages that the United States sustains. 31 U.S.C. § 3729(a).

FN2. The private party's reward for prosecuting the case depends, in part, upon whether the government decides to intervene. If the government chooses to intervene, the relator "shall receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim." 31 U.S.C. § 3730(d)(1). If the government decides not to intervene, the relator collects "not less than 25 percent and not more than 30 percent of the proceeds." *Id.* § 3730(d)(2). The relator may also collect reasonable expenses, attorneys' fees and costs. *Id.* §§ 3730(d)(1),(2). Foulds seeks to collect a Texas-sized reward based on her allegations of over 400,000

false claims (which could generate fines of between $5,000 and $10,000 each) and over $20 million in overpayments (which § 3729(a) would treble).

FN3. This abbreviated Latin phrase is shorthand for "he who as much for the king as for himself." *See generally* Note, *The History and Development of Qui Tam,* 1972 Wash. U. L.Q. 81, 83.

FN4. Foulds has not named this, or any, individual as a defendant in this suit.

FN5. To date, the United States has intervened solely for purposes of appeal. It would still be possible, however, for the United States to intervene at the district court level if proceedings were to continue. Section 3730(c)(3) states in part: "When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause."

FN6. In the original complaint, Foulds named five defendants: Lubbock County, Lubbock County Hospital District, University Medical Center, Texas Tech University, and Texas Tech Health Sciences Center. Only the latter two defendants are before us on this appeal.

FN7. In its order responding to the motion to dismiss, the district court did not comment on the fourth argument. We express no opinion as to it.

FN8. The reasoning is questionable because the district court could have decided that private citizens can use the qui tam device to bring states to court, while yet denying those citizens relief because the particular statute at issue (the FCA) did not subject states to liability. The statutory interpretation issue need not be determined by resolution of the Eleventh Amendment issue.

***295** FN9. In a recent case, the Supreme Court decided an Article III question before reaching an Eleventh Amendment issue and stated in a footnote that "[w]hile the Eleventh Amendment is jurisdictional in the sense that it is a limitation on the federal court's judicial power, and therefore can be raised at any stage of the proceedings, we have recognized that it is not co-extensive with the limitations on judicial power in Article III." *Calderon v. Ashmus,* 523 U.S. 740, 118 S.Ct. 1694, 1697 n. 2, 140 L.Ed.2d 970 (1998) (citation omitted). Nonetheless, the historical context surrounding the enactment of the Eleventh Amendment supports the position that the Eleventh Amendment, if not part and parcel of the Article III restrictions, is certainly intertwined with Article III jurisprudence. The Supreme Court's interpretation of Article III powers in *Chisholm v. Georgia,* 2 U.S. (2 Dall.) 419, 1 L.Ed. 440 (1793), prompted Congress' "outraged reversal" of that decision through enactment of the Eleventh Amendment. DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 99 (1985). In other words, Congress and the state legislatures enacted the Eleventh Amendment as a corrective retort to a judicial interpretation of Article III that was offensive. *See also Seminole Tribe,* 517 U.S. at 72-73, 116 S.Ct. 1114 ("The

Eleventh Amendment restricts the judicial power under Article III...."); *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779, 111 S.Ct. 2578, 115 L.Ed.2d 686 (1991) (Eleventh Amendment's sovereign immunity principle limits the judicial authority in Article III).

The Supreme Court (in an opinion issued after *Calderon*) has explicitly recognized that it has not yet decided whether Eleventh Amendment immunity is a matter of subject matter jurisdiction. *Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381, 118 S.Ct. 2047, 2054, 141 L.Ed.2d 364 (1998); *see also id.* at 2055 (Kennedy, J., concurring) (noting that the Court has treated the Eleventh Amendment as a limit on courts' subject matter jurisdiction in some respects, but as similar to personal jurisdiction requirements in other respects). (We note, however, that courts must also decide issues of personal jurisdiction before ruling on the merits. *Marathon Oil Co. v. A.G. Ruhrgas*, 145 F.3d 211, 222-23 (5th Cir.) (en banc), *cert. granted*, --- U.S. ----, 119 S.Ct. 589, 142 L.Ed.2d 532 (1998).) While the Supreme Court has left this question open, our court has repeatedly referred to the Eleventh Amendment's restriction in terms of subject matter jurisdiction. *See, e.g., Warnock v. Pecos County, Texas*, 88 F.3d 341, 343 (5th Cir.1996) ("Because [Eleventh Amendment] sovereign immunity deprives the court of jurisdiction, the claims barred by sovereign immunity can be dismissed only under Rule 12(b)(1) and not with prejudice."); *John G. and Marie Stella Kenedy Mem'l Found. v. Mauro*, 21 F.3d 667, 673-75 (5th Cir.1994) (finding that the district court erred in ruling on motion for partial summary judgment after the Eleventh Amendment deprived the court of subject matter

jurisdiction); *Stem v. Ahearn,* 908 F.2d 1, 4 (5th Cir.1990) (when applicable, Eleventh Amendment will divest federal courts of subject matter jurisdiction); *McDonald v. Board of Miss. Levee Comm'rs,* 832 F.2d 901, 906 (5th Cir.1987) (quoting *Crane v. Texas,* 759 F.2d 412, 415 (5th Cir.1985)) ("[E]leventh amendment immunity is a jurisdictional issue that 'cannot be ignored, for a meritorious claim to that immunity deprives the court of subject matter jurisdiction of the action.' "); *Darlak v. Bobear,* 814 F.2d 1055, 1064 (5th Cir.1987) (dismissal of case on Eleventh Amendment grounds recognized court's lack of subject matter jurisdiction and did not constitute a judgment on the merits); *Clark v. Tarrant County, Texas,* 798 F.2d 736, 739 (5th Cir.1986) (court lacked subject matter jurisdiction over s 1983 claims because of Eleventh Amendment). Until the Supreme Court, Congress, or an en banc panel of this court reverses this practice, we must continue it. *Barber v. Johnson,* 145 F.3d 234, 237 (5th Cir.1998) (stating the Fifth Circuit rule). *See also Seaborn v. Florida,* 143 F.3d 1405, 1407 (11th Cir.1998) (assertion of Eleventh Amendment immunity challenges a court's subject matter jurisdiction and must be resolved before a court may address the merits of the underlying claim); *Brown v. North Carolina Div. of Motor Vehicles,* No. 97-2784, 1999 WL 66089, at *11 n. * (4th Cir. Feb.12, 1999) (affirming dismissal for lack of subject matter jurisdiction based on Eleventh Amendment immunity, and then refusing to decide other statutory and constitutional issues); *Doe v. University of Illinois,* 138 F.3d 653, 656 n. 2 (7th Cir.1998) (Eleventh Amendment immunity defense is a question of courts' subject matter jurisdiction); *ANR Pipeline Co. v. Lafaver,* 150 F.3d 1178, 1186 n. 8 (10th Cir.1998) (noting

that courts should avoid reaching the merits of a constitutional issue when the case may be decided on statutory grounds, but recognizing that courts must first face the constitutional issue of state sovereign immunity because it presents a controlling jurisdictional question); *Snoeck v. Brussa,* 153 F.3d 984, 988 (9th Cir.1998) (affirming district court's dismissal on Eleventh Amendment grounds and, therefore, finding it unnecessary to address standing issue). It bears mention that a dismissive footnote in *Gordon v. Texas,* 153 F.3d 190, 196 n. 4 (5th Cir.1998), arguably asserts that the Eleventh Amendment does not restrict a court's subject matter jurisdiction. To the extent that the *Gordon* opinion makes this assertion, we cannot be bound by it. The most recent Supreme Court decision (*Schacht*) has expressly recognized that the Court has never decided this issue. *Schacht,* 118 S.Ct. at 2054. Thus, our earlier circuit precedent continues to bind us. Where two panel decisions conflict, the prior decision constitutes the binding precedent.

***295** FN10. The "doctrine of hypothetical jurisdiction" is a phrase coined by the Ninth Circuit. *United States v. Troescher,* 99 F.3d 933, 934 n. 1 (1996).

FN11. In *Ruhrgas,* the en banc opinion quotes the relevant language in *Steel Co.* rejecting the doctrine of hypothetical jurisdiction. Appended to this quotation is the parenthetical "(majority opinion)." *Ruhrgas,* 145 F.3d at 216. It is not entirely clear, however, that this portion of the Supreme Court's opinion attracted five votes. Justices Breyer, Stevens, Souter, and Ginsburg expressed disagreement with an absolute rejection of hypothetical jurisdiction. *Steel Co.,* 118

S.Ct. at 1020-21 (Breyer, J., concurring); *id.* at 1031-32 (Stevens, J., concurring); *id.* at 1032 (Ginsburg, J., concurring). Although Justice O'Connor said at the beginning of her concurring opinion (which Justice Kennedy joined) that she joined the Court's opinion, she penned an equivocal passage concerning the doctrine of hypothetical jurisdiction:

> I ... agree with the Court's statement that federal courts should be certain of their jurisdiction before reaching the merits of a case.... I write separately to note that, in my view, the Court's opinion should not be read as cataloging an exhaustive list of circumstances under which federal courts may exercise judgment in "reserv[ing] difficult questions of ... jurisdiction when the case alternatively could be resolved on the merits in favor of the same party."

Steel Co., 118 S.Ct. at 1020 (O'Connor, J., concurring) (quoting *Norton v. Mathews,* 427 U.S. 524, 532, 96 S.Ct. 2771, 49 L.Ed.2d 672 (1976)). *But see Fidelity Partners, Inc. v. First Trust Co. of New York,* 142 F.3d 560, 565 (2d Cir.1998) (Supreme Court has rejected doctrine of hypothetical jurisdiction in *Steel Co.*); *Seaborn v. Florida,* 143 F.3d 1405, 1407 n. 2 (11th Cir.1998) (Supreme Court "squarely rejected" the doctrine of hypothetical jurisdiction). *Compare Hardemon v. City of Boston,* 144 F.3d 24, 26 (1st Cir.1998) ("The various opinions in the case, read as a whole, are not entirely clear as to whether (or to what extent) *Steel Co.* undermines our earlier practice [of assuming jurisdiction]. In all events, having noted the red flag, we see no need in this case to test the outer limits of the Court's

tolerance, and, thus, we turn to the jurisdictional issue."), *with id.* at 30 (Bownes, J., concurring) ("Reading the majority and concurring opinions in *Steel Co.* together, there is a Supreme Court majority in support of the general rule that 'federal courts should be certain of their jurisdiction before reaching the merits of a case.' "). Although the final tally of the justices' votes may not be clear, our en banc opinion in *Ruhrgas* compels us to recognize Justice Scalia's *Steel Co.* opinion as authoritative.

FN12. No one has challenged Foulds's standing in this case. We must, however, consider possible objections to standing *sua sponte*. *Lang v. French*, 154 F.3d 217, 222 (5th Cir.1998). Our court has explicitly found that qui tam plaintiffs have standing. *United States ex rel. Weinberger v. Equifax, Inc.*, 557 F.2d 456, 460 (5th Cir.1977). As noted in a district court opinion concluding that relators lack standing, since our opinion in *Equifax*, the Supreme Court has refined its standing jurisprudence. *United States ex rel. Riley v. St. Luke's Episcopal Hosp.*, 982 F.Supp. 1261 (S.D.Tex.1997). Yet, with regard to this issue, we consider persuasive a recent Supreme Court decision dealing with a qui tam issue under the False Claims Act. *See Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 117 S.Ct. 1871, 138 L.Ed.2d 135 (1997) (holding that portions of the 1986 amendments to the Act do not apply retroactively). The *Hughes Aircraft* Court did not raise any standing objections.

***295** FN13. Although we express no opinion as to whether the government's presence as intervenor would change the Eleventh Amendment analysis, we do note that at least one

Supreme Court case may be relevant to that question. In an original action before the Supreme Court involving a dispute between two states over water rights of the Colorado River, the Court allowed Indian Tribes to intervene after the United States had actively intervened in the case. *Arizona v. California,* 460 U.S. 605, 613-14, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983). In concluding that the Eleventh Amendment did not bar this intervention, the Supreme
Court stated:

> The Tribes do not seek to bring new claims or issues against the states, but only ask leave to participate in an adjudication of their vital water rights that was *commenced* by the United States. Therefore, our judicial power over the controversy is not enlarged by granting leave to intervene, and the States' sovereign immunity protected by the Eleventh Amendment is not compromised.

Id. (emphasis added).

FN14. The Eleventh Amendment cloaks Texas Tech University and Texas Tech University Health Sciences Center with sovereign immunity as state institutions. *See Wallace v. Texas Tech Univ.,* 80 F.3d 1042, 1047 n. 3 (5th Cir.1996) (citing *Henry v. Texas Tech Univ.,* 466 F.Supp. 141, 144-46 (N.D.Tex.1979) (Texas Tech University and Texas Tech University School of Medicine both enjoy sovereign immunity)). As the district court noted, the Texas legislature has changed the name of Texas Tech University School of

Medicine to Texas Tech University Health Sciences Center. *Foulds,* 980 F.Supp. at 870 n. 4.

FN15. *United States v. Texas,* 143 U.S. 621, 646, 12 S.Ct. 488, 36 L.Ed. 285 (1892) (Texas consented to suit by the United States when admitted into the Union).

FN16. Our own circuit's precedent describes the United States as "a" real party in interest rather than "the" real party in interest. *Searcy v. Philips Electronics North America Corp.,* 117 F.3d 154, 156 (5th Cir.1997) (case involving qui tam suit against a private corporation). In contrast, the Second, Fourth, Eighth and Ninth Circuits all use the definite article. *But see Stevens,* 162 F.3d at 221 (Weinstein, J., dissenting) ("it is apparent that the United States is not the only real party in interest in this case"). As we shall see, our use of the indefinite, rather than the definite, article has relevant consequences in deciding which party "commences and prosecutes" the suit within the meaning of the Eleventh Amendment.

FN17. *See generally* Valerie R. Park, Note, *The False Claims Act, Qui Tam Relators, and the Government: Which is the Real Party to the Action?,* 43 Stan. L.Rev. 1061 (1991).

FN18. The Second Circuit has indicated that the interests of a qui tam plaintiff are akin to the interests of an attorney working for a contingent fee. *Stevens,* 162 F.3d at 202. We think this analogy, while conceptually clear, is flawed because of important distinctions between the roles of a qui tam plaintiff and a contingent fee lawyer. For example, an

attorney owes important fiduciary duties to his client that the qui tam plaintiff does not owe to the United States. No legal duty prevents the qui tam plaintiff from furthering his own interests to the detriment of the United States' interests. *Cf. United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715, 718 (9th Cir.1994) (qui tam case in which "[t]he government thought that the parties might have specifically structured the settlement so as to reduce the amount the government realized" by placing the bulk of the settlement amount into a wrongful termination claim instead of the FCA claim); *United States, Mathews v. Bank of Farmington*, 166 F.3d 853, 858-59 (7th Cir.1999) (noting that the FCA would not prevent some types of "troubling" and opportunistic claims); *Searcy v. Philips Electronics North America Corp.*, 117 F.3d 154, 160 (5th Cir.1997) (noting that relators can manipulate settlements of qui tam litigation in ways that "unfairly enrich them and reduce benefits to the government," but then holding that the Attorney General always retains the right to object to these settlements); *Stevens*, 162 F.3d at 225-29 (Weinstein, J., dissenting) (arguing, on an abstract level, that qui tam plaintiffs bringing suits against states can undermine federal interests by thwarting the healthy process whereby federal representatives, federal administrators, and state administrators work together to coordinate the administration of programs involving the federal and state governments). Furthermore, the Supreme Court has found that a different analogy applies: Qui tam methods of prosecution "compare with the ordinary methods as the enterprising privateer does to the slow-going public vessel." *Hughes Aircraft*, 117 S.Ct. at 1877 (quoting *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541, n. 5, 63 S.Ct. 379, 87

L.Ed. 443 (1943)) (quoting *United States v. Griswold,* 24 F. 361, 366 (D.Or.1885)).

***295** FN19. We went on to conclude, however, that the United States could appeal the district court's order as a proper non-party appellant. *Searcy,* 117 F.3d at 157-58.

FN20. Our early legislators adopted the qui tam concept from the English system. *See* Note, *The History and Development of Qui Tam,* 1972 Wash. U.L.Q. 81. Thus, it is significant that in his description of qui tam actions, William Blackstone indicated that either the king *or* the relator could "commence" a quit tam action:

> Sometimes one part [of the proceeds from suit] is given to the king, to the poor, or to some public use, and the other part to the informer or *prosecutor;* and then the suit is called a *qui tam* action, because *it is brought* by a person *"qui tam pro domino rege quam pro se imposo sequitur."* If the king therefore *himself commences* this suit, he shall have the whole forfeiture.

3 William Blackstone, *Commentaries* *160. Blackstone penned this passage less than thirty years before ratification of the Eleventh Amendment.

FN21. A critical issue related to this "deputization" argument, however, is whether the United States Congress can assign the power of the United States as a sovereign to sue another sovereign. Aside from the Eleventh Amendment issue, we note our concern as to whether Congress can, consistent with

the Constitution, deputize private parties to act on behalf of the Executive Branch. *See United States ex rel. Stevens v. Vermont Agency of Natural Resources,* 162 F.3d 195, 220 (2d Cir.1998) (Weinstein, J., dissenting) (discussing why "the FCA's qui tam procedures may violate the Appointments Clause of Article II of the Constitution, and may interfere with the President's explicitly stated constitutional duty to take care that the laws be faithfully executed"). Because we ultimately find that the federal courts have no jurisdiction over this suit, we do not (and, indeed, cannot) express any opinion on this non-jurisdictional issue. We do, however, note that the Department of Justice has indicated agreement with a memorandum published by the Office of Legal Counsel. *See* Memorandum for the General Counsels of the Federal Government, *The Constitutional Separation of Powers Between the President and Congress,* 1996 WL 876050 (O.L.C.) (Preliminary Print) (May 7, 1996). The Office of Legal Counsel states agreement with the view that "because qui tam plaintiffs are not officers of the United States, the FCA does not violate the Appointments Clause." *Id.* at *15 n. 66 (quoting *United States ex rel. Burch v. Piqua Engineering, Inc.,* 803 F.Supp. 115, 120 (S.D.Ohio 1992)).

FN22. Section 1362 states:

> The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1362 (1994).

FN23. The argument did not assert that Congress abrogated the states' sovereign immunity in § 1362. *Blatchford,* 501 U.S. at 785, 111 S.Ct. 2578. Rather, the tribes argued that the statute, like the FCA qui tam statute, simply allowed Indian tribes to litigate suits that the United States could have brought. *Id.*

FN24. Of course, citizens may, generally, pursue prospective injunctive relief against state officials. *See Edelman v. Jordan,* 415 U.S. 651, 664, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974) (recognizing the Eleventh Amendment distinction between retrospective and prospective relief). Foulds seeks only retrospective relief under the FCA. In her original complaint, however, Foulds also requested an order directing the defendants to "cease and desist from violating 31 U.S.C. § 3729." The FCA does not provide for this prospective relief. Since the qui tam plaintiff's standing is supported only by the FCA's qui tam provision, courts must deny any such requests. *Cf. Equifax,* 557 F.2d at 459-60 (qui tam plaintiff has no standing to seek declaratory judgment against defendant).

***295** FN25. Section 3730(h) states:

> Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or

> others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

31 U.S.C.A. § 3730(h) (West Supp.1998).

FN26. With respect to § 3730(h), Foulds has only requested retrospective, monetary relief.

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980 F.Supp. 864, U.S. ex rel. Foulds v. Texas Tech University, (N.D.Tex. 1997)

*864 980 F.Supp. 864

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UNITED STATES of America, ex rel. Carol Rae Cooper FOULDS, Plaintiff,

v.

TEXAS TECH UNIVERSITY, Texas Tech University Health Sciences Center, Lubbock County Hospital District, and University Medical Center, Defendants.

No. Civ. A. 5:95-CV-135-C.

United States District Court,
N.D. Texas,
Lubbock Division.

Oct. 3, 1997.

Physician and resident employed by university school of medicine filed qui tam action against university, its medical and health sciences centers, and county hospital district under False Claims Act, alleging provision of services to Medicare and Medicaid recipients in violation of applicable regulations. On motion of university defendants to dismiss, the District Court, Cummings, J., held that: (1) as matter of apparent first

impression, sovereign immunity is unavailable to state institution where government elects not to join in qui tam action brought by private relator under False Claims Act; (2) anti-retaliation provision of False Claims Act abrogated university defendants' Eleventh Amendment immunity; and (3) university defendants were "persons" for purposes of False Claims Act.

Motion denied.

1. **FEDERAL CIVIL PROCEDURE k1742(1)**
170A ----
170AXI Dismissal
170AXI(B) Involuntary Dismissal
170AXI(B)2 Grounds in General
170Ak1742 Want of Jurisdiction
170Ak1742(1) In general.

N.D.Tex. 1997.

Motion to dismiss for lack of subject matter jurisdiction may be granted on any of three separate bases: complaint alone; complaint supplemented by undisputed facts evidenced in record; or complaint supplemented by undisputed facts plus court's resolution of disputed facts. Fed.Rules Civ.Proc.Rule 12(b)(1), 28 U.S.C.A.

2. **FEDERAL CIVIL PROCEDURE k1825**
170A ----
170AXI Dismissal
170AXI(B) Involuntary Dismissal
170AXI(B)5 Proceedings
170Ak1825 Motion and proceedings thereon.

N.D.Tex. 1997.

Court usually will not look beyond four corners of pleadings to resolve motion to dismiss for failure to state claim, as this will convert motion to dismiss into motion for summary judgment. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

3. FEDERAL COURTS k265

170B ----

170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on

170BIV(A) In General

170Bk264 Suits Against States

170Bk265 Eleventh Amendment in general; immunity.

N.D.Tex. 1997.

Sovereign immunity involves two distinct rules, one limiting reach of substantive law and other jurisdiction of courts.

4. FEDERAL COURTS k265

170B ----

170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on

170BIV(A) In General

170Bk264 Suits Against States

170Bk265 Eleventh Amendment in general; immunity.

N.D.Tex. 1997.

Although Eleventh Amendment expressly prohibits suits against states by citizens of other states and does not mention states being sued by their own citizens, amendment also bars suits by citizens of state being sued. U.S.C.A. Const.Amend. 11.

5. **FEDERAL COURTS k265**

170B ----

170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on

170BIV(A) In General

170Bk264 Suits Against States

170Bk265 Eleventh Amendment in general; immunity.

[See headnote text below]

5. **FEDERAL COURTS k266.1**

170B ----

170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on

170BIV(A) In General

170Bk266 Waiver of Immunity

170Bk266.1 In general.

[See headnote text below]

5. **FEDERAL COURTS k267**

170B ----

170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on

170BIV(A) In General

170Bk266 Waiver of Immunity

170Bk267 Consent to suit.

N.D.Tex. 1997.

Exceptions to state's Eleventh Amendment immunity from suit exist where state consents to suit in federal court or waives its right to assert immunity, and where nature of the suit determines that sovereign immunity is unavailable. U.S.C.A. Const.Amend. 11.

6. FEDERAL COURTS k265

170B ----

170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on

170BIV(A) In General

170Bk264 Suits Against States

170Bk265 Eleventh Amendment in general; immunity.

N.D.Tex. 1997.

State's sovereign immunity is not an issue in suit by federal government against state, as state has no sovereign immunity in that situation. U.S.C.A. Const.Amend. 11.

7. FEDERAL COURTS k269

170B ----

170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on

170BIV(A) In General

170Bk268 What Are Suits Against States

170Bk269 State officers or agencies, actions against.

N.D.Tex. 1997.

State university and its health care center were state institutions, enjoying Eleventh Amendment immunity from suits not brought by federal government. U.S.C.A. Const.Amend. 11.

8. FEDERAL COURTS k269

170B ----

170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on

170BIV(A) In General

170Bk268 What Are Suits Against States

170Bk269 State officers or agencies, actions against.

N.D.Tex. 1997.

Sovereign immunity under Eleventh Amendment is unavailable to state institution where government elects not to join in qui tam action brought by private relator under False Claims Act; government remains real party in interest despite its election. U.S.C.A. Const.Amend. 11; 31 U.S.C.A. § 3729 et seq.

9. UNITED STATES k120.1

393 ----

393VIII Claims Against United States

393k120 Making or Presentation of False Claims and Other Offenses Relating to Claims

393k120.1 In general.

N.D.Tex. 1997.

Purpose behind False Claims Act, and specifically behind anti-retaliation provision thereof, is to discourage fraud against government and to encourage those with knowledge of fraud to come forward. 31 U.S.C.A. §§ 3729 et seq., 3730(h).

10. FEDERAL COURTS k269

170B ----

170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on

170BIV(A) In General

170Bk268 What Are Suits Against States

170Bk269 State officers or agencies, actions against.

N.D.Tex. 1997.

Anti-retaliation provision of False Claims Act abrogated Eleventh Amendment immunity of state university and its health center with respect to qui tam suit brought by former employee. U.S.C.A. Const.Amend. 11; 31 U.S.C.A. § 3730(h).

11. STATUTES k233

361 ----

361VI Construction and Operation

361VI(A) General Rules of Construction

361k233 Construction as including or binding government.

N.D.Tex. 1997.

Ordinarily, in common usage, term "person" does not include the sovereign, and statutes employing word "person"

are ordinarily construed to exclude sovereign from their reach.

12. UNITED STATES k120.1

393 ----

393VIII Claims Against United States

393k120 Making or Presentation of False Claims and Other Offenses Relating to Claims

393k120.1 In general.

N.D.Tex. 1997.

State university and its health care center, although state institutions, were "persons" for purposes of former employee's qui tam action under False Claims Act, and were therefore subject to suit thereunder. 31 U.S.C.A. § 3729 et seq.

***866** Gene Storrs, Mark A. Wilson, Smith, Storrs, Wilson & McConnell, P.C., Amarillo, TX, Randall B. Pyles, Pyles & Holloway, Plainview, TX, Mary Louise Cohen, Phillips & Cohen, Washington, DC, for Plaintiff.

Toni Hunter, Chief Litigation Div., Atty. Gen. of TX, Austin, TX, for Defendants.

MEMORANDUM OPINION AND ORDER

CUMMINGS, District Judge.

The court's order filed September 30, 1997, is **WITHDRAWN**. This order is substituted in its place.

Presently before the Court is the defendants' motion to dismiss a *qui tam* action (FN1) filed by relator (FN2) Carol Rae Cooper Foulds ("Foulds") under the False Claims Act, 31 U.S.C. § 3729 *et seq.* (West Supp.1997). Foulds alleges that Texas Tech University ("Texas Tech") and Texas Tech University Health Sciences Center ("TTUHSC") (FN3) submitted false claims to the United States of America (the "Government") in violation of the False Claims Act by permitting physician-residents who were ineligible for Medicare or Medicaid provider numbers, and who were not under the personal and identifiable guidance from a staff physician, to provide services to patients which were later billed to Medicare or Medicaid as "physician's services." Texas Tech and TTUHSC have moved to dismiss this lawsuit pursuant to 12(b)(1) and (6) of the Federal Rules of Civil Procedure asserting three theories: (1) the relator is precluded from suing Texas Tech and TTUHSC because of sovereign immunity; (2) the "real party in interest" exception to sovereign immunity in a *qui tam* action is unavailable as it relates to section 3730(h) of the False Claims Act; and (3) the state is not a "person" for purposes of the False Claims Act.

Since the filing of the motion to dismiss, the court dismissed defendant Lubbock County. Therefore, Lubbock County Hospital District, University Medical Center, Texas Tech, and TTUHSC remain as defendants. The court granted a joint motion for stay and administratively closed this case after the motion to dismiss was filed so that an audit could be conducted by the Office of Inspector General. On August 19, 1997, the court lifted the stay and re-opened the case. Additionally, and important to the resolution of portions of the motion to dismiss, the Government elected not to intervene in this *qui tam* action. After reviewing the motion

and briefs filed by the parties, and in light of recent case law since the administrative closure of this case, the court is of the opinion that the motion to dismiss must be **DENIED.**

Brief History of *Qui Tam* Provisions and the False Claims Act

Qui tam provisions in statutes are nothing new to American jurisprudence and have been in existence for hundreds of years in England. *United States ex rel. Marcus v. Hess,* 317 U.S. 537, 541 n. 4, 63 S.Ct. 379, 383 n. 4, 87 L.Ed. 443 (1943). They were a routine feature of early federal legislation, starting with the First Congress, and continuing through subsequent early Congresses and administrations. *See generally,* Stuart M. Gerson, *Issues and Development in Qui* ***867** *Tam Suits Under the False Claims Act, in* CITIZEN SUITS AND QUI TAM ACTIONS: PRIVATE ENFORCEMENT OF PUBLIC POLICY (1996) (listing several informer statutes passed by the early Congresses). Therefore, *qui tam* suits were well established when the False Claims Act was passed in 1863.

The purpose behind the enactment of the False Claims Act was to stop the "massive frauds perpetrated by large contractors during the Civil War." *United States v. Bornstein,* 423 U.S. 303, 309, 96 S.Ct. 523, 528, 46 L.Ed.2d 514 (1976). Though the motivation of present-day *qui tam* relators has been questioned and likened to that of a bounty hunter or privateer, *Hughes Aircraft Co. v. United States ex rel. Schumer,* --- U.S. ----, ----, 117 S.Ct. 1871, 1877, 138 L.Ed.2d 135 (1997), the recruitment of paradigms with high morality was never the intent of the statute--stopping fraudulent claims and bringing rogues to justice was the motivation. Senator

Howard, sponsor of the False Claims Act, opined that the False Claims Act was intended to

> hold out to a confederate a strong temptation to betray his coconspirator, and bring him to justice.... I have based the [provisions] upon the old-fashioned idea of holding out a temptation, and "setting a rogue to catch a rogue," which is the safest and most expeditious way I have ever discovered of bringing rogues to justice.

Cong. Globe, 37th Cong., 3d Sess. 955-56 (1863). As evidenced from the present suit, the False Claims Act's *qui tam* provision is not limited to actions brought against defense contractors who have overcharged the Government. The *qui tam* provision has been used in the past, as is presently being attempted, to stop fraud in the medical arena. *See, e.g., United States ex rel. Glass v. Medtronic,* 957 F.2d 605 (8th Cir.1992); *United States ex rel. Woodard v. Country View Care Ctr. Inc.,* 797 F.2d 888 (10th Cir.1986).

The False Claims Act's Current Provisions

Title 31 of the United States Code § 3730 provides for a cause of action for any person who violates 31 U.S.C. § 3729. The current version of the False Claims Act, as amended in 1986, provides that a person who commits any of several specified violations "is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person." 31 U.S.C. § 3729(a). This action may be instituted by either the Attorney General or by a private person, the relator, in order to enforce the provisions of the False Claims

Act. *Id.* § 3730(a), (b)(1). Primary responsibility for enforcing the False Claims Act is vested in the Attorney General, who is required to diligently investigate violations of the False Claims Act. *Id.* § 3730(a). The False Claims Act, however, also has a *qui tam* provision that allows any private person with knowledge of a violation to bring an action in his individual capacity, as a *qui tam* relator, and on behalf of the Government. 31 U.S.C. § 3730(b). If the Attorney General institutes the suit prior to a private person with knowledge of a violation of the False Claims Act doing the same, the *qui tam* provision of the False Claims Act is not implicated.

The amount of the relator's recovery is dependant upon whether the Government elects to intervene. If the Government elects to intervene, the relator may recover, subject to some limitations, "at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim." *Id.* § 3730(d)(1). The relator's recovery is significantly higher if the Government elects not to intervene. In such a situation, the relator would recover "not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement." *Id.* § 3730(d)(2).

Having explained the False Claims Act *qui tam* provision and the relator's motivation for instituting a *qui tam* action, the court turns now to the alleged false claims.

Alleged Facts

At the time Foulds instituted this lawsuit, she was a physician and a dermatology resident employed by the dermatology clinic of the TTUHSC School of Medicine in Lubbock, Texas. Her duties required her to attend to patients

admitted to University Medical Center, *868 which is controlled and supervised by the Lubbock County Hospital District, a political and taxing entity of Lubbock County whose board members are appointed by the Lubbock County Commissioner's Court.

Foulds began working for the TTUHSC School of Medicine in July of 1993 in various clinics operated by TTUHSC. While working in these clinics she would examine patients, make diagnoses, and prescribe treatment for patients. Although these duties were supposed to be performed under the supervision of staff physicians, Foulds alleges that when she began working in the dermatology department, those duties were being performed by the residents, without any supervision by staff physicians. Foulds alleges that staff physicians would not personally examine the patients, and most of the time, were not even in the clinic at the time those services were rendered to the patients. She contends that patient charts and Medicare/Medicaid billing forms were signed by the staff physicians after the residents rendered medical services certifying that the services were personally rendered by the staff physician or by the staff physician's employee under his or her personal supervision when such was not the case. According to Foulds, the charts of these patients were placed on the desk of the faculty member in charge for that day so that the chart and the Medicare/Medicaid billing form could be signed by a staff physician, using the staff physician's provider number, even though the staff physician never actually saw the patient or provided any personal and identifiable guidance to the residents. Foulds contends that approximately seventy patients per day, five days a week, were seen in this manner in the dermatology clinic prior to July 1994, and approximately

eighty percent of these patients were Medicare/Medicaid patients.

Foulds' complaint chronicles the alleged errors and fraudulent claims of the staff physicians. According to Foulds, staff physicians failed or refused to review the patient's history; to personally examine the patients; to confirm or revise diagnoses; to determine the course of treatment to be followed; to ensure that the supervision needed by the interns and residents was furnished; and to review the patient's progress. She maintains that the dermatology department was not the only department making false and fraudulent claims. Foulds concludes that the departments of surgery and internal medicine were following the same practice and the combined fraudulent claims of the departments resulted in an estimated $21,840,000.00 in overpayments by the Government. As a result of bringing these things to the attention of Texas Tech and TTUHSC, Foulds alleges that she was retaliated against.

Motion to Dismiss

Texas Tech and TTUHSC have moved to dismiss this action under 12(b)(1) and/or 12(b)(6). Fed.R.Civ.P. 12. Although alternatively pleaded, the standard for granting a dismissal under each is slightly, yet importantly, different. However, the factual allegations of a complaint must be accepted as true whether a motion for dismissal is made on the basis of lack of subject matter jurisdiction or for failure to state a cause of action. *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974); *Saraw Partnership v. United States,* 67 F.3d 567, 569 (5th Cir.1995); *Capital Parks v. Southeastern Adver. and Sales System,* 30

F.3d 627, 629 (5th Cir.1994).

Standard for Dismissal under 12(b)(1)

A 12(b)(1) motion, Fed.R.Civ.P. 12, strikes at the heart of a district court's jurisdiction and must be resolved before addressing other motions, including Rule 12 motions. *Bell v. Hood,* 327 U.S. 678, 682, 66 S.Ct. 773, 776, 90 L.Ed. 939 (1946). The motion is made whenever the movant asserts that the district court lacks jurisdiction over the subject matter of the lawsuit. Fed.R.Civ.P. 12(b)(1). This motion must be considered before all others because it is axiomatic that the district court loses jurisdiction to entertain other motions once it determines that it lacks jurisdiction. *Menchaca v. Chrysler Credit Corp.,* 613 F.2d 507, 512 (5th Cir.), *reh'g denied,* 622 F.2d 1043, *cert. denied,* 449 U.S. 953, 101 S.Ct. 358, 66 L.Ed.2d 217 (1980). In such cases, those motions become moot. *Peoples State Bank v. Garrett,* 142 F.R.D. 438, 441 (N.D.Tex.1991).

***869** [1] In the Fifth Circuit, a motion to dismiss for lack of subject matter jurisdiction may be granted on any of three separate bases: "(1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Voluntary Purchasing Groups, Inc. v. Reilly,* 889 F.2d 1380, 1384 (5th Cir.1989)(citing *Williamson v. Tucker,* 645 F.2d 404, 413 (5th Cir.), *cert. denied,* 454 U.S. 897, 102 S.Ct. 396, 70 L.Ed.2d 212 (1981)). Because there are no disputed or undisputed facts which are relevant to the resolution of the motion to dismiss, the motion will be considered based solely upon the

complaint.

Standard for Dismissal under 12(b)(6)

[2] A 12(b)(6) motion is a "lineal descendant of the common law general demurrer" and is used to test the formal sufficiency of the statements of the claims for relief. 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* s 1355 (1990). Although it is the lineal descendant of a general demurrer, actual demurrers are no longer used and have been abolished by the Federal Rules of Civil Procedure. Fed.R.Civ.P. 7(c). Notwithstanding the history of the demurrer or its descendant, a court usually will not look beyond the four comers of the pleadings to resolve a 12(b)(6) motion as this will convert the motion to dismiss into a motion for summary judgment. Fed.R.Civ.P. 12(b); *Fleischer v. United States Dep't of Veterans Affairs,* 955 F.Supp. 731, 734 (S.D.Tex.1997).

Sovereign Immunity

[3] Sovereign immunity involves two distinct rules which are not always separately recognized. One limits the reach of substantive law, the other, the jurisdiction of the courts. *Seminole Tribe of Florida v. Florida,* 517 U.S. 609, ----, 116 S.Ct. 1114, 1146, 134 L.Ed.2d 252 (1996)(Souter, J., dissenting)(citing 77 Harv. L.Rev. 1, 3-4 (1963)). Texas Tech and TTUHSC's motion, in so far as it relates to sovereign immunity, addresses the latter.

[4] [5] [6] The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. Although the amendment expressly prohibits suits against states by citizens of other states and does not mention states being sued by their own citizens, the Supreme Court has long held that the Eleventh Amendment also bars suits by citizens of the state being sued. *See Hans v. Louisiana,* 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890); *Pennhurst State School & Hosp. v. Halderman,* 465 U.S. 89, 99, 104 S.Ct. 900, 907, 79 L.Ed.2d 67 (1984); *Welch v. Texas Dep't of Highways and Public Transp.,* 483 U.S. 468, 472-73, 107 S.Ct. 2941, 2945-46, 97 L.Ed.2d 389 (1987)(plurality opinion). There are of course exceptions to this general rule. For example: a state may consent to suit in federal court; a state may waive its right to assert immunity; or the nature of the suit may determine whether sovereign immunity is available. *See, e.g., Edelman v. Jordan,* 415 U.S. 651, 673, 94 S.Ct. 1347, 1360-61, 39 L.Ed.2d 662 (1974)(holding that a state's consent to suit in federal court must be unequivocally expressed); *Clark v. Barnard,* 108 U.S. 436, 447-48, 2 S.Ct. 878, 883-84, 27 L.Ed. 780 (1883)(holding that a state may waive its sovereign immunity); *Ex parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908)(recognizing an exception to the Eleventh Amendment when an individual sues a state officer in order to ensure that the officer's conduct is in compliance with federal law). Despite the above exceptions, however, a state's sovereign immunity is not an issue in a suit by the federal government against the state because the state has no

sovereign immunity. *West Virginia v. United States,* 479 U.S. 305, 311, 107 S.Ct. 702, 707, 93 L.Ed.2d 639 (1987).

[7] [8] That Texas Tech and TTUHSC are state institutions and therefore enjoy Eleventh Amendment immunity, when not sued by the Government, is clear. *Wallace v. Texas Tech Univ.,* 80 F.3d 1042, 1047 n. 3 ***870** (5th Cir.1996)(citing *Henry v. Texas Tech Univ.,* 466 F.Supp. 141, 144-46 (N.D.Tex.1979). (FN4) What is not entirely clear is whether states or state agencies enjoy the same immunity in a *qui tam* action when the Government has elected not to intervene. Although apparently *res nova* in the Fifth Circuit, the Fourth Circuit has addressed this issue and determined that sovereign immunity is unavailable when the Government elects not to join in the *qui tam* action because the Government is the real party in interest. (FN5) *United States ex rel. Milam v. University of Texas M.D. Anderson Cancer Ctr.,* 961 F.2d 46 (4th Cir.1992). The Second Circuit has held that the Government is the real party in interest but has not explicitly stated that sovereign immunity is unavailable to a state defendant, presumably because it determined that the relator was not the original source of information and therefore lacked standing. *United States ex rel. Kreindler v. United Technologies Corp.,* 985 F.2d 1148 (2d Cir.) *cert. denied,* 508 U.S. 973, 113 S.Ct. 2962, 125 L.Ed.2d 663 (1993).

Despite the holdings of these circuits, however, Texas Tech and TTUHSC assert that the False Claims Act's *qui tam* provision cannot be enforced against them because of the Supreme Court's recent decision in *Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996). They wish to have this court find that *Seminole Tribe*

of Florida, though not express, was a *de facto* overruling of the Fourth and Second Circuits' holdings. For the reasons that follow, this court finds their argument unpersuasive.

In *Seminole Tribe of Florida,* the Supreme Court addressed the issue of whether the "Eleventh Amendment prevent[s] Congress from authorizing suits by Indian tribes against States for prospective injunctive relief to enforce legislation enacted pursuant to the Indian Commerce Clause." *Id.* at ----, 116 S.Ct. at 1122. In holding that the Eleventh Amendment did prevent such suits, the Supreme Court engaged in a two step analysis. First, the Court determined whether Congress' intent to abrogate the states' immunity from suit was unmistakably clear. *Id.* at ----, 116 S.Ct. at 1123. After answering the first prong in the affirmative, the Court went on to the second step. The Court then asked whether the act was passed " 'pursuant to a valid exercise of power.' " *Id.* at ----, 116 S.Ct. at 1124 (quoting *Green v. Mansour,* 474 U.S. 64, 68, 106 S.Ct. 423, 426, 88 L.Ed.2d 371 (1985)). Finding that it was not, the Court determined that it was without jurisdiction. *Id.* at ---- - ----, 116 S.Ct. at 1131-32.

Texas Tech and TTUHSC's motion to dismiss asserts that the *qui tam* provision of the False Claims Act is not unmistakably clear in abrogating a state's Eleventh Amendment rights, and therefore, does not pass the first step of the analysis found in *Seminole Tribe of Florida.* Texas Tech and TTUHSC's reliance upon *Seminole Tribe of Florida* is misplaced and this court need not address its holding because the defense of sovereign immunity is unavailable. This court is of the opinion that the Fourth Circuit's holding in *United States ex rel. Milam* is sound and should be followed.

The Government is the real party in interest to this *qui tam* action. Therefore, sovereign immunity is unavailable and the Supreme Court's analysis and holding in *Seminole Tribe of Florida* has no bearing upon this case.

Therefore, Texas Tech and TTUHSC's motion to dismiss for lack of subject matter ***871.** jurisdiction, as it relates to sovereign immunity, is **DENIED.**

Eleventh Amendment and Section 3730(h)

Texas Tech and TTUHSC argue that the anti-retaliation provision of the False Claims Act, § 3730(h), does not waive their sovereign immunity, even if this court finds that the Government is the real party in interest, because there can be no injury to the Government in a retaliation claim, and therefore, the real-party-in-interest analysis does not apply. Although no case was cited for this bold assertion, two cases were cited for the proposition that subsection (h) of section 3730 does not abrogate a state's Eleventh Amendment immunity. *United States ex rel. Moore v. University of Michigan,* 860 F.Supp. 400 (E.D.Mich.1994); *WILKINS EX REL. UNITED STATES V. STATE OF OHIO,* 885 F.SUPP. 1055 (S.D.OHIO 1995)(FN6). Notwithstanding these cases and their holdings, they must be considered in light of the rationale behind the False Claims Act.

[9] [10] The Fifth Circuit has well stated the purpose behind section 3730(h) and the False Claims Act--to discourage fraud against the Government and to encourage those with knowledge of fraud to come forward. *Robertson v. Bell Helicopter Textron, Inc.,* 32 F.3d 948, 951 (5th Cir.1994), *cert. denied,* 513 U.S. 1154, 115 S.Ct. 1110, 130

L.Ed.2d 1075 (1995). If the Government is the real party in interest, then there is no logical reason why sovereign immunity should prevent a relator from utilizing section 3730(h) when a state or state agency is the defendant. If section 3730(h) is eviscerated, then the Government is truly the one that will suffer the greatest harm. This is because a "whistleblower" will not be encouraged to come forward with information for fear of being retaliated against. Accordingly, Texas Tech and TTUHSC's 12(b)(1) motion is **DENIED.**

A State Must be a "Person" Within the Meaning of the False Claims Act

[11] [12] Having addressed the issue of whether Texas Tech and TTUHSC are immune from suit because of their status as state institutions, and having found that they are not entitled to sovereign immunity, the court turns now to unraveling the mystery of what is a "person" for purposes of the False Claims Act. The False Claims Act does not define the word person. *See* 31 U.S.C. § 3729. Ordinarily, " 'in common usage, the term "person" does not include the sovereign, [and] statutes employing the [word] are ordinarily construed to exclude it.' " *Will v. Michigan Dep't of State Police,* 491 U.S. 58, 64, 109 S.Ct. 2304, 2308, 105 L.Ed.2d 45 (1989) (holding that "person" in 42 U.S.C. s 1983 does not include states)(quoting *Wilson v. Omaha Indian Tribe,* 442 U.S. 653, 667, 99 S.Ct. 2529, 2537, 61 L.Ed.2d 153 (1979)). Although this "clear statement rule," as it has been called, would seem to indicate that a state or state agency cannot be sued under the False Claims Act, this would be an illogical step to make in light of this court's finding that the Eleventh Amendment does not bar Fould's suit against Texas Tech and TTUHSC. The Fifth Circuit's recent decision in *Searcy,* 117

F.3d at 156, indicates that the Fourth Circuit's holding — that the Government is the real party in interest — is correct and will be followed in the future. Therefore, to find that Texas Tech and TTUHSC are not persons under this *qui tam* statute would be allowing them to assert sovereign immunity again, this time bringing it through the back door. Until the Fifth Circuit indicates otherwise, this court is unwilling to find that Texas Tech and TTUHSC are not persons under the statute. Therefore, the court **DENIES** Texas Tech and TTUHSC's 12(b)(6) motion.

SO ORDERED.

FN1. The term *"qui tam"* derives from the Latin phrase *"qui tam pro domino rege quam pro si ipso in hac parte sequitur,"* meaning, "Who sues on behalf of the King as well as for himself." Black's Law Dictionary 1251 (6th ed.1990). Thus a *qui tam* action is one "brought by an informer, under a statute which establishes a penalty for the commission or omission of a certain act, and provides that the same shall be recoverable in a civil action, part of the penalty to go to any person who will bring such action and the remainder to the state or some other institution." *Id.*

*871_ FN2. A "relator" is an informer plaintiff and "[a] party in interest who is permitted to institute a proceeding in the name of the People or the Attorney General when the right to sue resides solely in that official." Black's Law Dictionary 1289 (6th ed.1990).

FN3. Foulds' complaint actually sues Texas Tech Health Sciences Center rather than Texas Tech University Health Sciences Center. The court finds this to be a misnomer as

Texas Tech University Health Sciences Center is the party who received service and one of the parties to the motion to dismiss.

FN4. The text of *Henry v. Texas Tech University,* 466 F.Supp. 141 (N.D.Tex.1979), refers to both Texas Tech University and Texas Tech University School of Medicine enjoying sovereign immunity. This privilege applies to Texas Tech University Health Sciences Center as well, as the Texas legislature changed the name of Texas Tech University School of Medicine to Texas Tech University Health Sciences Center. *See* Act of May 18, 1979, 66th Leg., R.S., ch. 319, s 1, 1979 Tex. Gen. Laws 724, 724.

FN5. In *Searcy v. Philips Electronics North America Corp.,* 117 F.3d 154 (5th Cir.1997), the Fifth Circuit, in *dictum,* seemed to imply that it would follow the Fourth Circuit's holding in *United States ex rel. Milam v. University of Texas M.D. Anderson Cancer Center,* 961 F.2d 46 (4th Cir.1992). The focus of the *Searcy* court, however, was not on whether the Government was a real party in interest during the trial, but whether the Government was a party for appellate purposes even when it elected not to intervene but wished to challenge a settlement between the relator and defendant. *Searcy,* 117 F.3d at 157, 158.

FN6. Usually, an *"ex rel."* lawsuit is captioned with the governmental entity, usually the United States of America or a state, preceding the name of the relator, such that the caption of this case would normally be *United States ex rel. Wilkins v. State of Ohio.* Black's Law Dictionary 582 (6th ed.1990).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

UNITED STATES OF AMERICA, *ex rel.*, and CAROL RAE COOPER FOULDS,	)	
Plaintiffs,	)	Civil Action No. 5:95-CV-135-C
v.	)	
TEXAS TECH UNIVERSITY, et al,	)	
Defendants.	)	

ORDER

[FILED SEPTEMBER 29, 1997]

On August 5, 1996, this Court entered an Order which stated that the United States would have until 9:00 a.m. on September 16, 1996, to elect to intervene in this False Claims Act *qui tam* action. The Court's file reflects that the United States has not explicitly made this election. The Court

therefore finds that the United States has waived its right to intervene in this *qui tam* action.[1]

SO ORDERED.

Dated September 26, 1997.

/s/ Sam R. Cummings
SAM R. CUMMINGS
UNITED STATES DISTRICT JUDGE

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[1] The Court granted the Joint Motion for Stay on January 21, 1997. Neither that Order, nor any Order subsequent to the August 5, 1996 Order, extended the time for allowing the United States to elect to intervene in the *qui tam* action, as is implied from the body of the Joint Motion for Stay, filed on January 21, 1997. There were three reasons tendered for the motion to stay the proceedings, only one of which mentioned the United States' purported continued right to intervene. After 9:00 a.m. on September 16, 1996, the United States' right to intervene ended.

IN THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

No. 97-11182

UNITED STATES OF AMERICA, Ex Rel

Plaintiff - Intervenor

CAROL RAE COOPER FOULDS,

Plaintiff - Appellee

v.

TEXAS TECH UNIVERSITY, ET AL

Defendants

TEXAS TECH UNIVERSITY; TEXAS TECH
UNIVERSITY HEALTH SCIENCE CENTER

Defendants - Appellants

Appeal from the United States District Court for the
Northern District of Texas, Lubbock

ON PETITION FOR REHEARING EN BANC

[FILED JUNE 1, 1999]

(Opinion 3/29/99, 5 Cir., _____, _____F.3d _____)

Before JOLLY, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ E. Grady Jolly
United States Circuit Judge

REHG-6a

Chief Judge King and Judge Emilio M. Garza did not participate in the consideration of the rehearing en banc.

31 U.S.C. § 3729. False claims

(a) **Liability for certain acts.** — Any person who —

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or

employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that —

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of

damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) **Knowing and knowingly defined**. — For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information —

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required.

(c) **Claim defined**. — For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) **Exemption from disclosure**. — Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) **Exclusion**. — This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

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§ 3730. Civil actions for false claims

(a) **Responsibilities of the attorney general**. — The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) **Actions by private persons**. — (1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to > Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall —

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) **Rights of the parties to Qui Tam actions**. — (1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action

notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as —

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy

available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) **Award to Qui Tam plaintiff.** — (1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be

made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) **Certain actions barred**. — (1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C.App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of

allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

(f) **Government not liable for certain expenses**. — The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) **Fees and expenses to prevailing defendant**. — In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times

the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

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§ 3731. False claims procedure

(a) A subpoena requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title may be served at any place in the United States.

(b) A civil action under section 3730 may not be brought —

(1) more than 6 years after the date on which the violation of section 3729 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,

whichever occurs last.

(c) In any action brought under section 3730, the United States shall be required to prove all essential elements of the

cause of action, including damages, by a preponderance of the evidence.

(d) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.

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§ 3732. False claims jurisdiction

(a) **Actions under section 3730.** — Any action under section 3730 may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

(b) **Claims under state law.** — The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730.

§ 3733. Civil investigative demands

(a) **In general**. —

(1) **Issuance and service**. — Whenever the Attorney General has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation, the Attorney General may, before commencing a civil proceeding under section 3730 or other false claims law, issue in writing and cause to be served upon such person, a civil investigative demand requiring such person —

(A) to produce such documentary material for inspection and copying,

(B) to answer in writing written interrogatories with respect to such documentary material or information,

(C) to give oral testimony concerning such documentary material or information, or

(D) to furnish any combination of such material, answers, or testimony.

The Attorney General may not delegate the authority to issue civil investigative demands under this subsection. Whenever a civil investigative demand is an express demand for any product of discovery, the Attorney General, the Deputy Attorney General, or an Assistant Attorney General shall cause to be served, in any manner authorized by this section, a copy of such demand upon the person from whom the discovery was

obtained and shall notify the person to whom such demand is issued of the date on which such copy was served.

(2) **Contents and deadlines.** —

(A) Each civil investigative demand issued under paragraph (1) shall state the nature of the conduct constituting the alleged violation of a false claims law which is under investigation, and the applicable provision of law alleged to be violated.

(B) If such demand is for the production of documentary material, the demand shall —

(i) describe each class of documentary material to be produced with such definiteness and certainty as to permit such material to be fairly identified;

(ii) prescribe a return date for each such class which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying; and

(iii) identify the false claims law investigator to whom such material shall be made available.

(C) If such demand is for answers to written interrogatories, the demand shall —

(i) set forth with specificity the written interrogatories to be answered;

(ii) prescribe dates at which time answers to written interrogatories shall be submitted; and

(iii) identify the false claims law investigator to whom such answers shall be submitted.

(D) If such demand is for the giving of oral testimony, the demand shall —

(i) prescribe a date, time, and place at which oral testimony shall be commenced;

(ii) identify a false claims law investigator who shall conduct the examination and the custodian to whom the transcript of such examination shall be submitted;

(iii) specify that such attendance and testimony are necessary to the conduct of the investigation;

(iv) notify the person receiving the demand of the right to be accompanied by an attorney and any other representative; and

(v) describe the general purpose for which the demand is being issued and the general nature of the testimony, including the primary areas of inquiry, which will be taken pursuant to the demand.

(E) Any civil investigative demand issued under this section which is an express demand for any product

of discovery shall not be returned or returnable until 20 days after a copy of such demand has been served upon the person from whom the discovery was obtained.

(F) The date prescribed for the commencement of oral testimony pursuant to a civil investigative demand issued under this section shall be a date which is not less than seven days after the date on which demand is received, unless the Attorney General or an Assistant Attorney General designated by the Attorney General determines that exceptional circumstances are present which warrant the commencement of such testimony within a lesser period of time.

(G) The Attorney General shall not authorize the issuance under this section of more than one civil investigative demand for oral testimony by the same person unless the person requests otherwise or unless the Attorney General, after investigation, notifies that person in writing that an additional demand for oral testimony is necessary. The Attorney General may not, notwithstanding section 510 of title 28, authorize the performance, by any other officer, employee, or agency, of any function vested in the Attorney General under this subparagraph.

(b) **Protected material or information.** —

(1) **In general.** — A civil investigative demand issued under subsection (a) may not require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony if such material, answers, or

testimony would be protected from disclosure under —

(A) the standards applicable to subpoenas or subpoenas duces tecum issued by a court of the United States to aid in a grand jury investigation; or

(B) the standards applicable to discovery requests under the Federal Rules of Civil Procedure, to the extent that the application of such standards to any such demand is appropriate and consistent with the provisions and purposes of this section.

(2) **Effect on other orders, rules, and laws**. — Any such demand which is an express demand for any product of discovery supersedes any inconsistent order, rule, or provision of law (other than this section) preventing or restraining disclosure of such product of discovery to any person. Disclosure of any product of discovery pursuant to any such express demand does not constitute a waiver of any right or privilege which the person making such disclosure may be entitled to invoke to resist discovery of trial preparation materials.

(c) **Service; jurisdiction**. —

(1) **By whom served**. — Any civil investigative demand issued under subsection (a) may be served by a false claims law investigator, or by a United States marshal or a deputy marshal, at any place within the

territorial jurisdiction of any court of the United States.

(2) **Service in foreign countries**. — Any such demand or any petition filed under subsection (j) may be served upon any person who is not found within the territorial jurisdiction of any court of the United States in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign country. To the extent that the courts of the United States can assert jurisdiction over any such person consistent with due process, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance with the section by any such person that such court would have if such person were personally within the jurisdiction of such court.

(d) **Service upon legal entities and natural persons**. —

(1) **Legal entities**. — Service of any civil investigative demand issued under subsection (a) or of any petition filed under subsection (j) may be made upon a partnership, corporation, association, or other legal entity by —

(A) delivering an executed copy of such demand or petition to any partner, executive officer, managing agent, or general agent of the partnership,

corporation, association, or entity, or to any agent authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity;

(B) delivering an executed copy of such demand or petition to the principal office or place of business of the partnership, corporation, association, or entity; or

(C) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to such partnership, corporation, association, or entity at its principal office or place of business.

(2) **Natural persons**. — Service of any such demand or petition may be made upon any natural person by —

(A) delivering an executed copy of such demand or petition to the person; or

(B) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to the person at the person's

residence or principal office or place of business.

(e) **Proof of service**. — A verified return by the individual serving any civil investigative demand issued under subsection (a) or any petition filed under subsection (j) setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f) **Documentary material**. —

(1) **Sworn certificates**. — The production of documentary material in response to a civil investigative demand served under this section shall be made under a sworn certificate, in such form as the demand designates, by —

(A) in the case of a natural person, the person to whom the demand is directed, or

(B) in the case of a person other than a natural person, a person having knowledge of the facts and circumstances relating to such production and authorized to act on behalf of such person.

The certificate shall state that all of the documentary material required by the demand and in the possession, custody, or control of the

person to whom the demand is directed has been produced and made available to the false claims law investigator identified in the demand.

(2) **Production of materials**. — Any person upon whom any civil investigative demand for the production of documentary material has been served under this section shall make such material available for inspection and copying to the false claims law investigator identified in such demand at the principal place of business of such person, or at such other place as the false claims law investigator and the person thereafter may agree and prescribe in writing, or as the court may direct under subsection (j)(1). Such material shall be made so available on the return date specified in such demand, or on such later date as the false claims law investigator may prescribe in writing. Such person may, upon written agreement between the person and the false claims law investigator, substitute copies for originals of all or any part of such material.

(g) **Interrogatories**. — Each interrogatory in a civil investigative demand served under this section shall be answered separately and fully in writing under oath and shall be submitted under a sworn certificate, in such form as the demand designates, by —

(1) in the case of a natural person, the person to whom the demand is directed, or

(2) in the case of a person other than a natural person, the person or persons responsible for answering each interrogatory.

If any interrogatory is objected to, the reasons for the objection shall be stated in the certificate instead of an answer. The certificate shall state that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted. To the extent that any information is not furnished, the information shall be identified and reasons set forth with particularity regarding the reasons why the information was not furnished.

(h) **Oral examinations.** —

(1) **Procedures.** — The examination of any person pursuant to a civil investigative demand for oral testimony served under this section shall be taken before an officer authorized to administer oaths and affirmations by the laws of the United States or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall, personally or by someone acting under the direction of the officer and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically and shall be transcribed. When the testimony is fully transcribed, the officer before whom the testimony is taken shall promptly transmit a copy of the transcript of the testimony to the custodian. This subsection shall not preclude the taking of testimony by any means authorized by, and in a manner consistent with, the Federal Rules of Civil Procedure.

(2) **Persons present.** — The false claims law investigator conducting the examination shall exclude from

the place where the examination is held all persons except the person giving the testimony, the attorney for and any other representative of the person giving the testimony, the attorney for the Government, any person who may be agreed upon by the attorney for the Government and the person giving the testimony, the officer before whom the testimony is to be taken, and any stenographer taking such testimony.

(3) **Where testimony taken**. — The oral testimony of any person taken pursuant to a civil investigative demand served under this section shall be taken in the judicial district of the United States within which such person resides, is found, or transacts business, or in such other place as may be agreed upon by the false claims law investigator conducting the examination and such person.

(4) **Transcript of testimony**. — When the testimony is fully transcribed, the false claims law investigator or the officer before whom the testimony is taken shall afford the witness, who may be accompanied by counsel, a reasonable opportunity to examine and read the transcript, unless such examination and reading are waived by the witness. Any changes in form or substance which the witness desires to make shall be entered and identified upon the transcript by the officer or the false claims law investigator, with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness, unless the witness in writing waives the signing, is ill, cannot be found, or refuses to sign. If the transcript is not signed by the witness within 30 days

after being afforded a reasonable opportunity to examine it, the officer or the false claims law investigator shall sign it and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with the reasons, if any, given therefor.

(5) **Certification and delivery to custodian**. — The officer before whom the testimony is taken shall certify on the transcript that the witness was sworn by the officer and that the transcript is a true record of the testimony given by the witness, and the officer or false claims law investigator shall promptly deliver the transcript, or send the transcript by registered or certified mail, to the custodian.

(6) **Furnishing or inspection of transcript by witness**. — Upon payment of reasonable charges therefor, the false claims law investigator shall furnish a copy of the transcript to the witness only, except that the Attorney General, the Deputy Attorney General, or an Assistant Attorney General may, for good cause, limit such witness to inspection of the official transcript of the witness' testimony.

(7) **Conduct of oral testimony**. — (A) Any person compelled to appear for oral testimony under a civil investigative demand issued under subsection (a) may be accompanied, represented, and advised by counsel. Counsel may advise such person, in confidence, with respect to any question asked of such person. Such person or counsel may object on the record to any question, in whole or in part, and shall briefly state for

the record the reason for the objection. An objection may be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on the grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. Such person may not otherwise object to or refuse to answer any question, and may not directly or through counsel otherwise interrupt the oral examination. If such person refuses to answer any question, a petition may be filed in the district court of the United States under subsection (j)(1) for an order compelling such person to answer such question.

(B) If such person refuses to answer any question on the grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of part V of title 18.

(8) **Witness fees and allowances**. — Any person appearing for oral testimony under a civil investigative demand issued under subsection (a) shall be entitled to the same fees and allowances which are paid to witnesses in the district courts of the United States.

(i) **Custodians of documents, answers, and transcripts**. —

(1) **Designation**. — The Attorney General shall designate a false claims law investigator to serve as custodian of documentary material, answers to interrogatories, and transcripts of oral testimony received under this section, and shall designate such

additional false claims law investigators as the Attorney General determines from time to time to be necessary to serve as deputies to the custodian.

(2) **Responsibility for materials; disclosure.** —

(A) A false claims law investigator who receives any documentary material, answers to interrogatories, or transcripts of oral testimony under this section shall transmit them to the custodian. The custodian shall take physical possession of such material, answers, or transcripts and shall be responsible for the use made of them and for the return of documentary material under paragraph (4).

(B) The custodian may cause the preparation of such copies of such documentary material, answers to interrogatories, or transcripts of oral testimony as may be required for official use by any false claims law investigator, or other officer or employee of the Department of Justice, who is authorized for such use under regulations which the Attorney General shall issue. Such material, answers, and transcripts may be used by any such authorized false claims law investigator or other officer or employee in connection with the taking of oral testimony under this section.

(C) Except as otherwise provided in this subsection, no documentary material, answers to interrogatories, or transcripts of oral testimony,

or copies thereof, while in the possession of the custodian, shall be available for examination by any individual other than a false claims law investigator or other officer or employee of the Department of Justice authorized under subparagraph (B). The prohibition in the preceding sentence on the availability of material, answers, or transcripts shall not apply if consent is given by the person who produced such material, answers, or transcripts, or, in the case of any product of discovery produced pursuant to an express demand for such material, consent is given by the person from whom the discovery was obtained. Nothing in this subparagraph is intended to prevent disclosure to the Congress, including any committee or subcommittee of the Congress, or to any other agency of the United States for use by such agency in furtherance of its statutory responsibilities. Disclosure of information to any such other agency shall be allowed only upon application, made by the Attorney General to a United States district court, showing substantial need for the use of the information by such agency in furtherance of its statutory responsibilities.

(D) While in the possession of the custodian and under such reasonable terms and conditions as the Attorney General shall prescribe —

(i) documentary material and answers

to interrogatories shall be available for examination by the person who produced such material or answers, or by a representative of that person authorized by that person to examine such material and answers; and

(ii) transcripts of oral testimony shall be available for examination by the person who produced such testimony, or by a representative of that person authorized by that person to examine such transcripts.

(3) **Use of material, answers, or transcripts in other proceedings**. — Whenever any attorney of the Department of Justice has been designated to appear before any court, grand jury, or Federal agency in any case or proceeding, the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony received under this section may deliver to such attorney such material, answers, or transcripts for official use in connection with any such case or proceeding as such attorney determines to be required. Upon the completion of any such case or proceeding, such attorney shall return to the custodian any such material, answers, or transcripts so delivered which have not passed into the control of such court, grand jury, or agency through introduction into the record of such case or proceeding.

(4) **Conditions for return of material**. — If any documentary material has been produced by any person

in the course of any false claims law investigation pursuant to a civil investigative demand under this section, and —

> (A) any case or proceeding before the court or grand jury arising out of such investigation, or any proceeding before any Federal agency involving such material, has been completed, or
>
> (B) no case or proceeding in which such material may be used has been commenced within a reasonable time after completion of the examination and analysis of all documentary material and other information assembled in the course of such investigation,

the custodian shall, upon written request of the person who produced such material, return to such person any such material (other than copies furnished to the false claims law investigator under subsection (f)(2) or made for the Department of Justice under paragraph (2)(B) which has not passed into the control of any court, grand jury, or agency through introduction into the record of such case or proceeding.

(5) **Appointment of successor custodians**. — In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony produced pursuant to a civil investigative demand under this section, or in the event of the official relief of such custodian from responsibility for the custody and control of such

material, answers, or transcripts, the Attorney General shall promptly —

(A) designate another false claims law investigator to serve as custodian of such material, answers, or transcripts, and

(B) transmit in writing to the person who produced such material, answers, or testimony notice of the identity and address of the successor so designated.

Any person who is designated to be a successor under this paragraph shall have, with regard to such material, answers, or transcripts, the same duties and responsibilities as were imposed by this section upon that person's predecessor in office, except that the successor shall not be held responsible for any default or dereliction which occurred before that designation.

(j) **Judicial proceedings**. —

(1) **Petition for enforcement**. — Whenever any person fails to comply with any civil investigative demand issued under subsection (a), or whenever satisfactory copying or reproduction of any material requested in such demand cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of the civil investigative demand.

(2) **Petition to modify or set aside demand.** —

(A) Any person who has received a civil investigative demand issued under subsection (a) may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon the false claims law investigator identified in such demand a petition for an order of the court to modify or set aside such demand. In the case of a petition addressed to an express demand for any product of discovery, a petition to modify or set aside such demand may be brought only in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending. Any petition under this subparagraph must be filed —

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon

any failure of the demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person. During the pendency of the petition in the court, the court may stay, as it deems proper, the running of the time allowed for compliance with the demand, in whole or in part, except that the person filing the petition shall comply with any portions of the demand not sought to be modified or set aside.

(3) **Petition to modify or set aside demand for product of discovery.** —

(A) In the case of any civil investigative demand issued under subsection (a) which is an express demand for any product of discovery, the person from whom such discovery was obtained may file, in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending, and serve upon any false claims law investigator identified in the demand and upon the recipient of the demand, a petition for an order of such court to modify or set aside those portions of the demand requiring production of any such product of discovery. Any petition under this subparagraph must be filed —

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return

date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the portions of the demand from which relief is sought to comply with the provisions of this section, or upon any constitutional or other legal right or privilege of the petitioner. During the pendency of the petition, the court may stay, as it deems proper, compliance with the demand and the running of the time allowed for compliance with the demand.

(4) **Petition to require performance by custodian of duties**. — At any time during which any custodian is in custody or control of any documentary material or answers to interrogatories produced, or transcripts of oral testimony given, by any person in compliance with any civil investigative demand issued under subsection (a), such person, and in the case of an express demand for any product of discovery, the person from whom such discovery was obtained, may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian, a petition for an order of such

court to require the performance by the custodian of any duty imposed upon the custodian by this section.

(5) **Jurisdiction**. — Whenever any petition is filed in any district court of the United States under this subsection, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry out the provisions of this section. Any final order so entered shall be subject to appeal under section 1291 of title 28. Any disobedience of any final order entered under this section by any court shall be punished as a contempt of the court.

(6) **Applicability of federal rules of civil procedure**. — The Federal Rules of Civil Procedure shall apply to any petition under this subsection, to the extent that such rules are not inconsistent with the provisions of this section.

(k) **Disclosure exemption**. — Any documentary material, answers to written interrogatories, or oral testimony provided under any civil investigative demand issued under subsection (a) shall be exempt from disclosure under section 552 of title 5.

(l) **Definitions**. — For purposes of this section —

(1) the term "false claims law" means —

(A) this section and sections 3729 through 3732; and

(B) any Act of Congress enacted after the date of the enactment of this section which prohibits, or makes available to the United States in any court of the United States any civil remedy with respect to, any false claim against, bribery of, or corruption of any officer or employee of the United States;

(2) the term "false claims law investigation" means any inquiry conducted by any false claims law investigator for the purpose of ascertaining whether any person is or has been engaged in any violation of a false claims law;

(3) the term "false claims law investigator" means any attorney or investigator employed by the Department of Justice who is charged with the duty of enforcing or carrying into effect any false claims law, or any officer or employee of the United States acting under the direction and supervision of such attorney or investigator in connection with a false claims law investigation;

(4) the term "person" means any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State;

(5) the term "documentary material" includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document, or data

compilations stored in or accessible through computer or other information retrieval systems, together with instructions and all other materials necessary to use or interpret such data compilations, and any product of discovery;

(6) the term "custodian" means the custodian, or any deputy custodian, designated by the Attorney General under subsection (i)(1); and

(7) the term "product of discovery" includes —

(A) the original or duplicate of any deposition, interrogatory, document, thing, result of the inspection of land or other property, examination, or admission, which is obtained by any method of discovery in any judicial or administrative proceeding of an adversarial nature;

(B) any digest, analysis, selection, compilation, or derivation of any item listed in subparagraph (A); and

(C) any index or other manner of access to any item listed in subparagraph (A).

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No. 99-321

In the Supreme Court of the United States

UNITED STATES OF AMERICA *ex rel.*
CAROL REA COOPER FOULDS,
Petitioner,

v.

TEXAS TECH UNIVERSITY AND
TEXAS TECH UNIVERSITY HEALTH SCIENCES CENTER,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

TEXAS TECH RESPONDENTS' BRIEF IN OPPOSITION

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In the Supreme Court of the United States

UNITED STATES OF AMERICA *ex rel.*
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On Petition for Writ of Certiorari to the
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TEXAS TECH RESPONDENTS' BRIEF IN OPPOSITION

At issue in this case is whether the Eleventh Amendment's general prohibition against actions "commenced or prosecuted" by citizens against an unconsenting state bars an action brought by a private *qui tam* plaintiff under the federal False Claims Act. U.S. CONST. amend. XI; 31 U.S.C. §§3729–3732.

The False Claims Act permits private citizens who believe a "person" has submitted a false claim for payment to the United States to sue the perpetrator to impose a penalty for the

false claim, including treble damages. §§3729–3730. As an incentive, the private plaintiff receives a portion of the award. §3730(d). While the statute deters fraud by private contractors, the Eleventh Amendment prohibits applying the False Claims Act to unconsenting states. The False Claims Act contains no language waiving the Eleventh Amendment immunity of states and, in any event, Congress has no power to abrogate the states' Eleventh Amendment immunity under its Article I constitutional powers. *Seminole Tribe v. Florida*, 517 U.S. 44, 72-73 (1996).

SUMMARY OF THE ARGUMENT

The Eleventh Amendment prohibits suits "commenced or prosecuted" against the states by private citizens. U.S. CONST. amend XI. Suits against states brought by private relators under the *qui tam* provisions of the False Claims Act violate the states' immunity as sovereigns and offend their dignitary interest in avoiding the coercive process of federal judicial tribunals in suits brought by private citizens. Congress cannot circumvent the Eleventh Amendment's proscriptions by allowing private plaintiffs to "stand in the shoes" of the federal government. *Qui tam* suits are "commenced" and "prosecuted" by private citizens, and the potential intervention of the United States cannot change that fact.

Because the Court has already granted the petition for writ of certiorari in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, No. 98-1828, to resolve the issue presented by petitioner, the Court should hold this petition pending resolution of *Stevens* and then dispose of the petition as appropriate.[1]

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1. Respondents have also filed a conditional cross-petition that raises the "persons" issue also presented in the *Stevens* case.

ARGUMENT

I. ALLOWING PRIVATE CITIZENS TO BRING *QUI TAM* SUITS AGAINST THE STATES VIOLATES THE ELEVENTH AMENDMENT.

Subjecting the states to suits for money damages brought by private citizens under the *qui tam* provisions of the False Claims Act violates the Eleventh Amendment and the principles that motivated its passage. *See* 31 U.S.C. §§3729–3732; U.S. CONST. amend. XI. The Eleventh Amendment was enacted in a firestorm of protest shortly after the Supreme Court's decision in *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), which held that Article III authorized a South Carolina citizen to bring a private suit for damages against the State of Georgia. One of the Amendment's primary aims was to address the states' concern that "federal courts would force them to pay their revolutionary war debts, leading to their financial ruin." *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 39 (1994); *see also Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 406 (1821).

In addition to the concern with protecting the states' fisc, Eleventh Amendment jurisprudence also emphasizes the need to protect the integrity of the states as sovereign entities. *Hess*, 513 U.S. at 39. "The Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity." *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (citing *Hans v. Louisiana*, 134 U.S. 1, 13 (1890)). The purpose of the Eleventh Amendment was to prevent the indignity of subjecting states to suits by private parties in federal court. *Id.* (citing *In re Ayers*, 123 U.S. 443, 505 (1887)).

By seeking money damages from the states at the urging of private plaintiffs, *qui tam* suits accomplish exactly what the Eleventh Amendment forbids. The Court has recognized "that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). *Qui tam* suits brought by private citizens against the states are indistinguishable from other suits that impermissibly seek the payment of damages from a state's treasury. That the relator brings suit "on behalf of" the United States is irrelevant for Eleventh Amendment purposes. *See United States ex rel. Long v. SCS Bus. & Tech. Inst., Inc.*, 173 F.3d 870, 883-84 (CADC 1999), *petition for cert. filed*, 68 U.S.L.W. 3116 (U.S. Aug. 2, 1999) (No. 99-213). The *qui tam* relator's supposed representation of the United States' interests is a legal fiction that cannot justify granting a private plaintiff the United States's exemption from the Eleventh Amendment's protections. *See In re Fernandez*, 130 F.3d 1138, 1138 (CA5 1997) (holding that private successors to the FDIC may not "avoid the Eleventh Amendment by slipping into the shoes of the United States"); *see also West Virginia v. United States*, 479 U.S. 305, 311 (1987) (sovereign immunity is not at issue in suit by federal government against state); *United States v. Texas*, 143 U.S. 621, 646 (1892) (same). It is "as plain as the sun" that Petitioner was "commenc[ing] or prosecut[ing]" *qui tam* suits "against one of the United States" in violation of the clear dictates of the Eleventh Amendment. *United States ex rel. Foulds v. Texas Tech Univ.*, 171 F.3d 279, 289 (CA5 1999); *see also* U.S. CONST. amend. XI. The Eleventh Amendment's protections of state sovereignty cannot be circumvented so easily. *See Seminole Tribe v. Florida*, 517 U.S. 44, 72-73 (1996).

When an action "is in essence one for the recovery of money from the state, the state is the real, substantial party in

interest and is entitled to invoke its sovereign immunity from suit." *Ford Motor Co. v. Department of Treasury of Ind.*, 323 U.S. 459, 464 (1945); *see also Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997). Even if the United States ultimately intervenes in the suit, that does not change the Eleventh Amendment analysis.[2] A private citizen is still commencing suit against the state for money damages. The Eleventh Amendment cannot countenance a private citizen's claim on state funds, regardless of whether the United States has joined the suit as a party.

II. CONGRESS HAS NOT CLEARLY ABROGATED STATE SOVEREIGN IMMUNITY IN THE FALSE CLAIMS ACT.

Congress did not attempt in the False Claims Act to clearly abrogate state sovereign immunity. *See Seminole*, 517 U.S. at 55-56; *Foulds*, 171 F.3d at 294. But even if Congress had clearly attempted to abrogate state sovereign immunity in the False Claims Act, it could not have validly done so. The Court has only allowed abrogation of state sovereign immunity under the Fourteenth Amendment. *Seminole*, 517 U.S. at 59, 63 (overruling the Court's short-lived holding to the contrary in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989) (plurality)). Congress enacted the False Claims Act under Article I of the Constitution, which the Court in *Seminole* held cannot be used to circumvent the Eleventh Amendment's limits on federal jurisdiction. *Id.* at 72-73; *see also United States ex rel. Stevens v. Vermont Agency of Nat. Resources*, 162 F.3d 195, 224 (CA2 1998) (Weinstein, J., dissenting), *petition granted*, (U.S. June 24, 1999) (No. 98-1828).

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2. The United States has not intervened in this suit, except to defend the constitutionality of the False Claims Act as applied to the states.

The pertinent analysis when state sovereignty is involved does not end with determining whether Congress has attempted to find a way to bypass the Eleventh Amendment, *i.e.*, by allowing a private party to vindicate "real party" rights of the federal government. Rather, the real question, as explained by the Court in *Seminole*, is whether Congress has the constitutional authority to do what it has done. *See Seminole*, 517 U.S. at 59; *see also City of Boerne v. Flores*, 117 S.Ct. 2157, 2159 (1997) (holding that the Religious Freedom Restoration Act was not a proper exercise of Congress's Fourteenth Amendment enforcement powers). As the Fifth Circuit held and as the D.C. Circuit in *Long* has observed, "[*q*]*ui tam* plaintiffs cannot qualify as surrogates of 'responsible federal officers' who have the right to represent the sovereign to sue the respective states." *Foulds*, 171 F.3d at 293; *see Long*, 173 F.3d at 883.

Just as Article I provided no basis for the expansion of Article III in *Seminole*, the federal government's right to sue states cannot be expanded in opposition to the Eleventh Amendment by the device of *qui tam* suits. It is offensive to the Eleventh Amendment to use the states' surrender of sovereignty to the federal government to allow private parties to bring states into court and prosecute actions against them.[3]

Nor can the *qui tam* relator hide behind the jurisdictional skirts of the federal government. Private citizens cannot assume the federal government's right to sue states, which "is a narrow and nontransferable exception to the broad and

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3. One commentator has suggested that *qui tam* actions are the hidden source of power to allow Congress to render the Supreme Court law on abrogation meaningless and should be used routinely to vindicate federal rights. *See* Jonathan R. Siegel, *The Hidden Source of Congress' Power to Abrogate State Sovereign Immunity*, 73 TEX. L. REV. 539 (1995).

fundamental constitutional principle of state sovereign immunity embodied in the Eleventh Amendment." *Stevens*, 162 F.3d at 214 (Weinstein, dissenting) (citing *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991)); *see also United States v. Texas*, 143 U.S. 621, 646 (1892) (recognizing the federal government's right to sue because states gave their consent in joining the union). This Court should require the United States to sue the states itself if, in the exercise of its supremacy, it determines that such a suit is required to preserve the "permanence of the Union." *Texas*, 143 U.S. at 644-45. The nature of dual sovereignty requires as much. "The preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government." *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1868).

If the *qui tam* device in the False Claims Act poses no constitutional problem, then Congress could set up any number of statutory devices to circumvent state sovereignty as long as there is a federal interest. Without Congress so stating, every Title IX, Title VI, and Section 504 case against a state would become a potential *qui tam* case, in which the plaintiff will demand, not actual damages, but a share of three times the federal funds received by the state for the past six years. Every public benefits class action involving federal funds could be a potential *qui tam* case.

The False Claims Act is unconstitutional—if applied to the states—because, through the *qui tam* device, it attempts to accomplish precisely what is forbidden by the Eleventh Amendment.

CONCLUSION

For these reasons, the Court should hold the petition for writ of certiorari pending resolution of the *Stevens* matter.

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